

(24,601)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 857.

THE JAMES CLARK DISTILLING COMPANY, APPELLANT,

*vs.*

THE WESTERN MARYLAND RAILWAY COMPANY AND  
THE STATE OF WEST VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print
Caption .....	1	1
Bill of complaint.....	2	1
Plaintiff's Exhibit 1—Letter, Rosier to James Clark Distilling Co., August 19, 1914, with post-office money order for \$4.00 .....	15	9
Bill of lading.....	16	9
Bill of lading..... (omitted in printing) ..	17	
Bill of lading..... ( “ “ ) ..	18	
Answer of the Western Maryland Ry. Co.....	19	10
Respondent's Exhibit 1—Bill of complaint before circuit court of Tucker county, W. Va., in the case of The State of West Virginia <i>vs.</i> The Western Maryland Ry. Co....	33	18
Respondent's Exhibit 2—Order of circuit court of Tucker county, W. Va., granting injunction, etc., in case of The State of West Virginia <i>vs.</i> The Western Maryland Ry. Co. ....	49	27
Petition of the State of West Virginia to be made a party to the case .....	52	29
Order as to filing petition.....	58	32

Petitioner's Exhibit 1—Bill of complaint before circuit court of Tucker county, W. Va., in the case of <i>The State of West Virginia vs. The Western Maryland Ry. Co.</i> (omitted in printing) .....	59	
Petitioner's Exhibit 2—Order of the circuit court of Tucker county, W. Va., granting injunction, etc., in the case of <i>The State of West Virginia vs. The Western Maryland Ry. Co.</i> .....	(omitted in printing) ..	76
Order making the State of West Virginia a party defendant...	80	32
Testimony of George J. Gocke.....	81	33
John Keating .....	85	35
Stanton Ennes .....	93	39
Walter A. Yingling.....	96	41
Certificates of counsel to testimony.....	98	42
Certificates of judge to testimony.....	98	42
Plaintiff's Exhibit 1 (Keating)—Result of examination of "Braddock Rye Whiskey" by J. H. Mallet.....	99	42
Plaintiff's Exhibit 2 (Keating)—Order blank of James Clark Distilling Co. ....	100	42
Price list .....	101	42
Plaintiff's Exhibit 3 (Keating)—Advertising circular of James Clark Distilling Co.....	102	42
Plaintiff's Exhibit 4 (Keating)—Advertisement of James Clark Distilling Co., facsimile cuts of different brands of goods showing design of bottling.....	103	42
Plaintiff's Exhibit 5—Self-addressed envelope of James Clark Distilling Co. ....	104	42
Opinion (Rose, J.).....	105	43
Decree .....	114	48
Perpetual injunction and return.....	117	50
Order directing reargument.....	121	52
Final decree .....	122	52
Opinion of circuit court of appeals (Woods, J.) in the case of <i>The State of West Virginia vs. The Adams Express Co.</i> .....	124	53
Petition for appeal and assignment of errors.....	125	62
Order fixing bond.....	128	63
Appeal bond .....	129	63
Citation and service.....	131	64
Præcipe for record.....	132	65
Order to transmit record.....	134	66
Clerk's certificate .....	134	67
Petition for extension of time for filing, etc.....	135	67
Order extending time for filing, etc.....	136	68
Stipulation to omit parts of the record in printing.....	138	68



1 UNITED STATES OF AMERICA,  
DISTRICT OF MARYLAND, *To-wit:*

At a District Court of the United States in and for the District of Maryland, Begun and Held at the City of Cumberland on the Last Monday in September, (Being the Twenty-eighth Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present: The Honorable John C. Rose, Judge Maryland District; John Philip Hill, Esq., attorney; George W. Padgett, Esq., Marshal; Arthur L. Spamer, clerk; William J. Feaga, deputy clerk.

Among other were the following proceedings, to wit:

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MARYLAND, a Corporation,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

2 *Bill of Complaint.*

Filed August 24, 1914.

In the District Court of the United States in and for the District of the State of Maryland. In Equity.

No. 2, Equity Docket. At Cumberland, Maryland.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
Complainant,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,  
Defendant.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, sitting at Cumberland, Maryland:

The Bill of Complaint of The James Clark Distilling Company, of Cumberland, Maryland, a corporation, and citizen of the State of Maryland, against the Western Maryland Railway Company, also a corporation, and citizen of Maryland, respectfully shows and complains to your honor, as follows:

1. That your orator is a corporation legally incorporated, organized and existing under the laws of the State of Maryland, and as such is a citizen of and an inhabitant of said State, residing therein,

and doing business in the City of Cumberland, in said State, and as such corporation, it is now and for a long time past has been engaged in the business of manufacturing, selling and dealing in spirituous and fermented liquors, and for many years last  
3 past has been doing a large and profitable business by the sale of such liquors and merchandise to persons residing in the States of West Virginia, Ohio, Pennsylvania and elsewhere.

2. That the defendant, The Western Maryland Railway Company, is a railroad corporation, legally incorporated, organized and existing under the laws of the State of Maryland, and is a citizen and resident of said State, and for several years last past has been, and is now the owner of a railroad beginning in the City of Baltimore, Maryland, and running thence westerly through the States of Maryland, Pennsylvania and West Virginia, and into and through the City of Cumberland, in Maryland, and from thence into and through the Counties of Mineral, Grant and Tucker, in said State of West Virginia, and for some years past has been, and is still now operating said railroad as a common carrier through said State, and is therefore a railroad company engaged as such common carrier, in interstate transportation of passengers and goods, wares and merchandise, between and through said States, and as such common carrier between the States of Maryland and West Virginia, is engaged in interstate commerce, and as such is one of the railroad companies subject to the Act of Congress to regulate commerce under the Interstate Commerce clause of the Constitution of the United States, approved February 4, 1887, and all the amendments thereto passed by Acts of Congress since said date, and especially the Act of Congress approved June 18, 1910, commonly called the Act to regulate commerce.

3. Your orator further charges that said railroad line is equipped by said Company with all necessary cars and other vehicles and instrumentalities and facilities, for shipment or carriage of goods, wares and merchandise, and the handling of such property transported by it from Cumberland through said Counties of

4 Mineral, Grant and Tucker, in West Virginia, and runs and operates from Cumberland, Maryland, through said Counties of West Virginia, daily trains, so equipped for such transportation, and has and maintains stations and platforms at various points in said Mineral, Grant and Tucker Counties, West Virginia, at and from which to deliver freight and merchandise so transported from Cumberland to said places, and has such a station for such delivery of such merchandise so transported, in the town of Parsons, in Tucker County, West Virginia, in constant charge of regular agents, and has at the City of Cumberland freight stations in charge of competent employees and agents for the receipt and acceptance of all lawful freight tendered said Company for transportation to all said points in the State of West Virginia, and that by reason of all of the foregoing, it is the legal duty of said Railroad Company, as such common carrier in interstate business, to accept for transportation over its said lines, all lawful goods, wares and merchandise delivered to its freight station at Cumberland for trans-

portation on its railroad from Cumberland through said States of Maryland and West Virginia to said points of delivery in the said counties of West Virginia, and that by said Act of Congress, commonly called the Act to regulate commerce, and by said amendments thereof, it was made the duty of said defendant company to provide and furnish such transportation for such goods and wares so tendered to it for transportation upon reasonable request therefor.

4. Your orator further says that by the aforesaid Act of Congress, and the amendments thereof, it was made unlawful for any common carrier subject to the provisions of the same, to make or give any undue or unreasonable preference or advantage to any particular person, or to any particular description of traffic in any

5 respect whatsoever, or to subject any particular person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever, and that for the reasons aforesaid, all the provisions of said Act are applicable to and binding upon said defendant railroad company, in respect to all transportation of goods, wares and merchandise from Cumberland, in Maryland, to said Counties in West Virginia.

5. Your orator further charges that in the due and regular course of its business, it did on the morning of the 20th day of August, 1914, receive at Cumberland, Maryland, by mail a written order from one Floyd Rosier, a citizen and resident of the town of Parsons, in Tucker County, West Virginia, to ship to him at Parsons, West Virginia by the first train from Cumberland, Maryland, four quarts of alcohol, of 1.88 proof, by express, which order to ship said liquor was accompanied by a money order for \$4.00 to pay your orator for the same, and your orator now says that said order was a bona fide order in every respect, and sent to your orator without any solicitation on the part of any person, inducing said Rosier to send the same, and that said order stated on its face that it was for the personal use of said Rosier, and your orator now charges that it has every reason to believe and does believe that said order came to it in a perfectly lawful manner, and that said liquor was intended for the personal use of the said Rosier, and that your orator has no reason whatever of any kind to suspect that said order for said liquor was given or intended, to in any way violate the laws of the State of West Virginia.

6. Your orator further charges that on said 20th day of August, 1914, it thereupon prepared said one gallon of alcohol, of the proof named in said order for shipment to said Rosier, and presented the same for transportation to the American Express Company,

6 which is the only express company shipping goods from Cumberland to Parsons by the aforesaid railroad of the defendant, but that the agents and officials of said express company refused to accept or transport the same, and that thereupon your orator delivered said shipment of alcohol to the proper employes, agents and officials of the defendant at its freight house at Cumberland, Maryland, for shipment over its said railway line by freight to the said Rosier, at Parsons, West Virginia, and tendered to pay or satisfy the freight charges for the delivery of said shipment, at

said town of Parsons, to said Rosier, and made demand on W. A. Yingling, Freight Agent of the defendant company at Cumberland, Maryland, at said freight house, to accept the same for such shipment to Parsons, but that said Yingling and all the agents and servants of the defendant company refused to accept the same, or to ship the same over said railway line of the defendant to said town of Parsons, giving as a reason therefor that said Railway Company had been enjoined by an order of the Circuit Court of Tucker County, State of West Virginia, from receiving, transporting or delivering any fermented or intoxicating liquors, at or in said three Counties of said State, except on conditions set out in said injunction so burdensome to said business and traffic and interstate transportation of said liquors, as made it impossible for said railway company to comply with the same, said agent and other employes giving no other reason for their refusal to accept and ship said merchandise, whereupon your orator took said alcohol to the Superintendent's office of said railway company, and again tendered the same for shipment to its customer at Parsons, West Virginia, but the officers in charge thereof also refused to accept the same for such transportation, and your orator now charges

7 that said defendant company absolutely refused to accept said shipment of alcohol from Cumberland to Parsons to said Rosier and refused to transport the same, and still does so refuse, whereby your orator has been unable to make said sale to said Rosier of said alcohol, and has been, and still is unable to ship the same to him and has lost the profit upon said sale and has been thus prevented from doing said business in interstate commerce, which it was entitled to do, and your orator now files herewith as part of this bill of complaint said original written order of said Floyd Rosier, and the money order he sent to pay for said liquor accompanying the same, and the triplicate bill of lading made out by your orator for the signature of the agent of the defendant, in the usual course of such business, for the shipment of the said goods, and which said agent refused to sign, all in one exhibit marked "Complainant's Exhibit No. 1."

7. Your orator further shows that by an Act of the Legislature of West Virginia, passed February 11, 1913, effective on the 1st day of July, 1914, the manufacture and sale or keeping for sale in the State of West Virginia of malt, vinous or spirituous liquors, wine, porter, ale, beer, or any intoxicating drink, mixture or preparation of like nature, (except certain articles not pertinent to the issue in this case), were prohibited, and by said Act it was provided that the words, liquors used therein should be construed to embrace all spirituous liquors or any other intoxicating drink, mixture or preparation of like nature, and all malt or brewed drinks, whether intoxicating or not, and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per cent of alcohol by volume, and your orator now admits that said four quarts of alcohol ordered by said Rosier was one of the kind of liquors mentioned

8 and covered by said Act of the Legislature of West Virginia, but your orator now charges that said Act did not prohibit

the sale by non-residents of the State of West Virginia to persons residing in West Virginia, of any of said liquors, where said liquors were purchased upon orders not solicited by the seller, and were desired for the consignee's own personal use, and that therefore the order of said Rosier was a perfectly lawful order for the reasons aforesaid under the laws of West Virginia, and that the transportation of such goods so purchased over said interstate line of railway, was in no wise prohibited by said law, and your orator is now advised that the injunction granted by the Circuit Court of Tucker County aforesaid and served upon the defendant company, was no legal or valid excuse for its refusal to accept and ship in interstate transportation said alcohol so offered to it for shipment, unless it be true that the requirements and restrictions set out in said injunction upon said railway company were in fact so burdensome to the said interstate business of said company, that it could not comply with the same, which your orator does not admit, but claims that said reasons given by the defendant for not making said shipment for your orator, present no valid grounds for the aforesaid denial of your orator's rights in the premises.

8. Your orator further charges that it owns and has on hand for sale and disposition within the State of Maryland a large and valuable quantity of various liquors of all kinds covered by the description in said Act of the Legislature of West Virginia, and that prior to the service of said injunction upon said defendant, your orator was doing a lucrative business in shipping such liquors to persons residing in West Virginia, upon their own personal, unsolicited

orders, for their own personal use, all of which sales and shipments your orator is advised were in no wise contrary to the laws of West Virginia or any Federal law; but that in the manner aforesaid your orator has been prevented, and is still prevented from making any more of said shipments over the railroad of the defendant to points in said three Counties in West Virginia, and that a large part of its aforesaid business since the 1st day of July, 1914, was lawfully done upon orders from said three counties, but that it is now informed by said defendant and said express company that neither of them, under the mandate and restrictions of said injunction, will hereafter accept any of said liquors for transportation to your orator's said customers, in said three Counties of West Virginia, upon their said orders, and that there is no other line of railroad or other practicable means of transportation by which your orator can serve its said customers in and through said three Counties of West Virginia, except by said interstate line of railway of the defendant, and that your orator has therefore no other means of serving its said customers except by interstate transportation over said railway, by reason of all of which your orator, unless the defendant is restrained by the order and injunction of this honorable court, will be wholly deprived of any and all such legitimate business which it otherwise could do with its said customers, in said three counties in West Virginia, upon their orders as aforesaid, and its said business, to this extent, will be wholly destroyed, and your orator will thereby

lose a very large and profitable business, and a large amount of profits much exceeding in value the sum of \$3,000.00, and that the matters in dispute as aforesaid, exceed, exclusive of interest and costs, the sum or value of three thousand dollars.

10 9. Your orator therefore charges that the defendant has violated, and is continuing from day to day to violate its duty as such interstate carrier, to provide and furnish transportation upon the reasonable requests of your orator, of its said lawful goods, wares and merchandise, which it desires to ship to its customers in said three counties of West Virginia, and is therefore acting in defiance of its duty as set out in Section 1 of said Act of Congress, commonly known as the Act to regulate commerce, and the amendments thereof, and that the defendant has already violated, and is continuing from day to day to violate the provisions of Section 3 of said Act, by subjecting your orator and its aforesaid business and traffic in said liquors, to an undue and unreasonable prejudice and disadvantage, and by its said conduct has destroyed the aforesaid lawful interstate traffic and business of your orator, with its said customers in said three counties of the State of West Virginia, and is therefore obnoxious to the condemnation of the provisions of said Section 3 of said Act, and by reason of the same your orator is entitled to all the rights and remedies by a complaint or suit in this Court against the defendant, for the prevention and redress of said wrong, provided or allowed by and under any and all laws of the United States.

10. Your orator further charges that if the defendant persists in its determination to refuse to accept for shipment said traffic of your orator, its violation of said Act of Congress and of its duty thereunder, will be of daily occurrence, for each of which violations your orator under said Act would be entitled to an action at law, in each of which actions it could recover a small amount of damages, but that such suits at law would afford your orator no full, complete and adequate remedy against the defendant on account of the

11 vast multiplicity of suits, which would be necessary on its part to obtain reparation for each and every one of said particular causes of damage, and that suits at law would not only furnish your orator no adequate remedies at law, but that unless it is speedily adjudged by a Court of competent jurisdiction, in matters of interstate commerce, that your orator has the right to make such shipments of goods, and that said defendant shall be compelled, by the mandate of this Court, to accept and transport the same, your orator's customers in the State of West Virginia will entirely cease to send in any such orders, and your orator will thereby lose all its aforesaid business permanently, and its loss will thus be irreparable, and your orator is therefore advised that its only complete and adequate remedy under the law and facts in this case, is by application to this Honorable Court for the passage of a decree in the nature of a mandatory order or injunction against the defendant, commanding and requiring it to cease refusing to accept and transport over its said railway line from Cumberland to points in said three counties of West Virginia, your orator's merchandise as aforesaid, and



commanding and requiring said defendant, to accept the same for transportation, and to transport the same in interstate commerce, from Cumberland, Maryland, and to deliver the same by means of its said railway to such points in said three counties of West Virginia, to which said goods shall be consigned by your orator, where the defendant maintains a permanent station with a regular agent for receiving and delivering goods and keeping a record of the same as required by the law of the State of West Virginia.

11. To the end therefore, that the defendant, The Western Maryland Railway Company, may answer the premises, and that a

decree of this Honorable Court may be passed, strictly commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them, to cease refusing to accept for transportation, over its railway line in due course of business, from Cumberland to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all such aforesaid Liquors, ordered by the said Floyd Rosier or other customers of your orator, for their own personal use, and without solicitation on the part of your orator, and enjoining and commanding the defendant, its servants, agents, employees and officers, to accept from your orator all such merchandise as aforesaid, presented to it for shipment over its line to said points in West Virginia, and enjoining and commanding the defendant, its servants, agents, employees and officers, to transport the same in interstate commerce, from Cumberland, in the State of Maryland, to all such points on its railway line in the said three counties of West Virginia, where the defendant maintains a permanent station with a regular agent for receiving and delivering such goods, and for the keeping of a record of the same as required by the law of West Virginia, and perpetually requiring and commanding the defendant to deliver all such liquors, presented for shipment by your orator, over its line at said points in said three counties of West Virginia, to the consignees thereof upon such aforesaid orders of your orator's customers, and that your orator may have such other and further relief as its case may require.

May it please your Honor to pass an order hereon, to be served by the United States Marshal of the State of Maryland, upon the defendant herein, commanding and requiring it to be and appear in this Court at Cumberland, Maryland, on some certain day to be fixed by the order of this Court, to thereupon answer the premises and show cause, if any it has, why such decree should not be passed as prayed.

And as in duty bound, etc.

WALTER C. CAPPER,  
J. PHILIP ROMAN,  
*Solicitors for Complainant.*

STATE OF MARYLAND,  
*Allegany County, To-wit:*

I hereby certify that on this 21st day of August, 1914, before me the subscriber, a Notary Public, in and for the State and County

aforesaid, personally appeared John Keating, Vice-President and Treasurer of the James Clark Distilling Company, of Cumberland, Maryland, the complainant in the above case, and made oath in due form of law that he is such Vice-President and Treasurer of said Company and familiar with its business and affairs, and is fully acquainted with the matters and things set out in the foregoing bill of complaint, and that the matters and things therein stated and set forth are true to the best of his information, knowledge and belief.

Witness my hand and Notarial Seal.

[NOTARY'S SEAL.]

GROVER J. DONAHOE,  
*Notary Public.*

My Commission Expires May 1, 1916.

14

PARSONS, W. Va., Aug. 19, 1914.

The James Clark Distilling Co., Cumberland, Md.

DEAR SIR: Please ship me to Parsons, W. Va., By Express 4 quarts of Alcohol 1.88 proof. Please find enclosed money order for \$4.00. Please ship at once.

Yours Resp.

FLOYD ROSIER,  
*Parsons, W. Va.*

By Return Train.  
For Personal use.

(Mem. of Clerk: Address, etc., on Envelope.)

Return in 5 days  
To Floyd Rosier,  
Parsons, W. Va.

Belington,  
Aug. 19  
11 A. M.  
1914.  
W. Va.

Cancelled 2¢  
Postage  
Stamp

THE JAMES CLARK DISTILLING Co.,  
Cumberland,  
Md.

553 Lock Box.



**CHARTS**

**TOO**

**LARGE**

**FOR**

**FILMING**

PLAINTIFF'S EXHIBIT NO. 1.

Filed August 24, 1914.

86242 BELINGTON, W. VA. 30457  
(Office Number) (Serial Number)

Aug. 19, 1914.

*Postal Money Order.*

Paying Office  
Stamp Here

Dollars Cents  
4 #  
(Amount for which issued)

Not Good for More Than  
Largest Amount Indicated  
on Left Hand Margin.

The Postmaster At Cumberland, Md., Will Pay  
Amount Stated Above To Order of Payee Named in  
Attached Coupon of Same Number.

B. B. ROHRBAUGH,  
*Postmaster.*

Received Payment:

Paying Postmaster Should Send This Order To  
Auditor With M. O. Statement.

86242 BELINGTON, W. VA. 30457  
(Office Number) (Serial Number)

*Coupon.*

Issuing Office  
Stamp Here

Four Dollars # Cents

Payee:  
JAMES CLARK DISTILLING CO.

Remitter:  
FLOYD ROSIER.

This Coupon should be retained at Paying Office.

Coupon stamped in red ink: Belington, W. Va.  
Aug. 19, 1914. M. O. B.

(Here follows bill of lading marked p. 16.)

\* \* \* \* \*

17-19 *Answer of the Western Maryland Railway Company.*

Filed September 14, 1914.

In the District Court of the United States in and for the District  
of the State of Maryland.

In Equity.

No. 2, Equity Docket. At Cumberland, Md.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-  
plainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation, De-  
fendant.

To the Honorable John C. Rose, Judge of the District Court of the  
United States for the District of Maryland, Sitting at Cumber-  
land, Md.:

The answer of the Western Maryland Railway Company to the  
bill of complaint of the James Clark Distilling Company, of Cum-  
berland, Maryland, in this case filed against it, respectfully shows to  
your Honor:

1. This respondent admits all the allegations of paragraphs one,  
two and three of the bill of complaint.

2. And as to paragraph four of said bill of complaint, this re-  
spondent admits generally that the matters and things therein stated  
are true, so far as they relate to interstate transportation of all ordi-  
nary goods, wares and merchandise, but cannot admit that the alle-  
gations in said paragraph are true in all cases, or that the Act of

20 Congress commonly called the Act to regulate commerce, and  
the amendments thereof, require this respondent to accept  
and make shipments of interstate traffic from the State of  
Maryland to delivery points in the State of West Virginia of all  
kinds of merchandise whatsoever, but on the contrary charges that  
in regard to such shipments of intoxicating liquors this respondent,  
in the matter of certain shipments thereof under certain circum-  
stances is prohibited from accepting intoxicating liquors for inter-  
state transportation between said points, and from transporting the  
same or delivering the same at points in West Virginia, by certain  
laws of the State of West Virginia, and an Act of Congress com-  
monly called the Webb-Kenyon Act, as will be more particularly  
hereinafter set out and explained.

3. And as to paragraph five of the bill of complaint, this re-  
spondent admits the allegations of said paragraph five, so far as it  
has knowledge of all the matters therein stated, but cannot admit as  
true the statement therein that the order from Floyd Rosier, therein  
referred to, was a bona fide order in every respect, or that it was

sent to the plaintiff without any solicitation on the part of any person inducing said Rosier to send the same. This respondent has no knowledge as to the truth of these particular statements with regard to said order, and therefore cannot admit the same, but leaves plaintiff to its proof of the same. But respondent is willing to admit that when said order from said Rosier was presented by the plaintiff along with the shipment of liquor therein mentioned to respondent's agent at Cumberland, requesting the acceptance and shipment of said liquor to Parsons, West Virginia, there was nothing on the face of said order or in the kind or character of said shipment of liquor which justified in any way a suspicion on the part of this respondent's agents that said -ment was being made by the plaintiff for the purpose of violating any of the aforesaid laws, State or Federal, but had every appearance of being a regular and legally authorized shipment of liquor under said laws.

4. Respondent further answering says that it admits that on the 20th day of August, 1914, plaintiff presented one gallon of alcohol for shipment to said Rosier, at Parsons, to the Agents of respondent at Cumberland, as charged in the bill of complaint, and that this respondent's agents refused to accept the same, or to transport the same in interstate commerce over its railway line to said town of Parsons, in West Virginia, and that respondent's agents gave to the agents of the plaintiff, respondent's reasons for refusing to receive, transport or deliver said alcohol as set out in said sixth paragraph, and gave the plaintiff's agents no other reason for such refusal, all as charged in said paragraph, and is willing to admit that by reason of respondent's refusal to so receive and transport said alcohol, the plaintiff has been unable to make sale of the same to said Rosier as charged, and has been, and is still, unable to ship the same to him, as charged, and that plaintiff has lost the profit on said sale, and has been to that extent prevented from doing business in interstate commerce as charged, and that its agents did refuse to sign the triplicate bills of lading made out by the plaintiff, covering said proposed shipment of said alcohol, and that the exhibit filed by plaintiff does contain said original order of said Floyd Rosier, and the money order he sent with the same to pay for said liquor, and the triplicate bills of lading made out by plaintiff, and which respondent's agents refused to sign.

22 5. And as to the seventh paragraph of the bill of complaint, this respondent admits that by an act of the Legislature of West Virginia, passed February 11, 1913, effective on the first day of July, 1914, the manufacture and sale, or keeping for sale, in the State of West Virginia, of malt, vinous or spirit-ous liquors, wine, porter, ale, beer, or any intoxicating drink, mixture or preparation of like nature, (except certain articles not pertinent to the issues in this case), were prohibited, and further admits that by said Act, it was provided that the word liquors used therein should be construed to embrace all spirit-ous liquors or any other intoxicating drink, mixture or preparation of like nature, and all malt or brewed drinks, whether intoxicating or not, and all liquids,

mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per cent of alcohol by volume, and further admits that said four quarts of alcohol ordered by said Rosier was one of the kinds of liquors mentioned and covered by said Act of the Legislature of West Virginia, and further admits that said Act did not prohibit the sale by non-residents of the State of West Virginia to persons residing in West Virginia of any of said liquors, where said liquors were purchased under orders, not solicited by the seller, and were desired or intended for the consignee's own personal use, and further admits that if it shall be made to appear to this Court that the order of said Rosier was given to plaintiff without solicitation, and was intended for said Rosier's own personal use, that said order was a lawful one under the laws of West Virginia, and therefore lawful under the aforesaid Act of Congress called the Webb-Kenyon law, and was not prohibited by said laws, but this respondent cannot admit

- 23 that said injunction granted by the Circuit Court of Tucker County, West Virginia, set out in the bill of complaint, and served on this respondent, was not a legal or valid excuse on the part of this respondent for its refusal to accept and ship in interstate transportation said alcohol so offered to it for shipment by the plaintiff, but on the contrary respondent charges that said injunction was a legal and valid excuse for its refusal to so accept and ship said alcohol, because said injunction of said Court contained certain requirements of things to be done by this respondent before it could accept and transport any of said liquors whatever under any circumstances into the State of West Virginia, until said requirements were complied with, and respondent now says that the requirements set out in said injunction were of such a character that it was impossible for this respondent to perform or comply with the same, for the reasons which will be more fully hereinafter set out, and that respondent being thus unable to comply with said requirements, it was advised that said injunction practically prohibited this respondent from accepting for shipment or shipping in interstate commerce from points outside the State of West Virginia to points within the State of West Virginia, of any and all liquors whatever, and respondent was further advised that until said injunction was either dissolved or modified it was bound to obey the same within the jurisdiction of the Court granting the same, which jurisdiction covered said Mineral, Grant and Tucker Counties of West Virginia, in the latter County of which the said town of Parsons is located, and respondent now says that it refused said shipment of liquor of the plaintiff for the sole reason that it was advised that the same was effective and binding upon it, unless it performed said impossible conditions, and admits that it did not
- 24 refuse said shipment of alcohol for any other reason whatever, and now pleads, avers and sets up the pendency of said injunction against it in regard to said liquors, as a lawful and valid excuse for its refusal to ship said liquors, and as a legal, equitable and sufficient answer to all the matters set out in said bill of complaint so filed against it.

6. And as to paragraph eight of the bill of complaint, this respondent admits that the plaintiff owns and has on hand for sale within the State of Maryland, a large and valuable quantity of various liquors, as charged, and that prior to said injunction the plaintiff was doing a lucrative business in shipping such liquors to persons in West Virginia, upon their personal orders, for their own personal use as charged, and further admits that all such business done with persons upon their unsolicited orders for said liquors for their own personal use, were in no wise contrary to the laws of West Virginia, or any Federal law as charged, and further admits that by the refusal of this respondent to ship any of said liquors in interstate commerce, the plaintiff is prevented from making any shipments of liquor over the railroad line of this respondent to any points in said three counties of West Virginia, as charged, and further admits that this respondent has informed the plaintiff and has heard and believes that said Express Company, has also informed it that each of them solely by reason of the pendency of said injunction, will hereafter refuse to accept any of said liquors for transportation to the plaintiff's customers in said three counties in West Virginia as charged, and further admits, as charged that there is no other line of railroad or other practicable means of transportation by which the plaintiff can serve a large part of its said customers in said three counties of West Virginia, except by the

25 interstate line of railway of your respondent or ship any of said liquors into any of said three counties as long as said injunction is pending, and plaintiff's said business to this extent will be destroyed and that the plaintiff will lose a large and profitable business in this regard, and a large amount of profits and respondent does not deny that said loss of profits of the plaintiff will, if said shipments are discontinued, amount to more than the sum of Three Thousand Dollars, exclusive of interest and costs, as charged, and does not deny therefore that the matters in dispute in this case exceed the value of three thousand dollars, exclusive of interest and costs as charged.

7. And answering the ninth paragraph of the bill of complaint, respondent says that it denies that it is continuing from day to day to violate its duty as such interstate carrier, by refusing to accept and furnish transportation for the aforesaid liquors upon the reasonable requests of the plaintiff of its said lawful goods, wares and merchandise, which it desires to ship to its customers in said three counties of West Virginia, as charged, and denies for the reasons aforesaid, and which will be more fully hereinafter set out, that it is acting in defiance of its duty as prescribed by Section 1, of said Act of Congress, commonly called an Act to regulate commerce, and the amendments thereof, as charged, and denies that respondent has already violated and is continuing from day to day to violate the provisions of Section 3, of said Act, by subjecting the plaintiff and its aforesaid business and traffic in said liquors, to an undue and prejudiced disadvantage as charged, and denies that respondent, by its said conduct has illegally destroyed the aforesaid lawful interstate traffic and business of the plaintiff with its said customers in



26 said three counties of West Virginia, as charged, and denies that it is obnoxious to the condemnation of the provisions of said Section 3, of said Act, or that the plaintiff is entitled to all the rights and remedies against this respondent provided by said Act of Congress, as charged, but on the contrary says that its aforesaid reasons and grounds for its refusal to make said shipments are valid and legal reasons for such refusal.

8. And as to paragraph ten of said bill of complaint, respondent says that it admits that if respondent continues to refuse said shipment of plaintiff's said liquors into said three counties of West Virginia, its alleged violation of said Act of Congress, will of course be of almost daily occurrence, and respondent further admits that suits at law for said supposed violations, of said Act of Congress would afford the plaintiff no full, complete and adequate remedy for said supposed wrongs, but would result in a vast multiplicity of suits as charged, and further admits that under the allegations of the bill of complaint, this Honorable Court has jurisdiction in equity, to adjudicate and determine the whole matter in controversy between this respondent and the plaintiff.

9. This respondent having now answered all the material allegations in the bill of complaint, for further answer thereto says: that on or about the 10th day of August, 1914, the State of West Virginia at the instance of the Honorable Fred O. Blue, State Commissioner of Prohibition, of the State of West Virginia, filed a bill of complaint in equity against this respondent in the Circuit Court of Tucker County, State of West Virginia, addressed to the Honorable F. M. Reynolds, Judge of said Court, he having jurisdiction of the Circuit Court of West Virginia, throughout the counties of Mineral, Grant and Tucker, in said State of such matters in equity, wherein said State recited the aforesaid Act of the Legislature of

27 West Virginia, effective on and after the first day of July, 1914, and recited the provisions of the Act of Congress commonly known as the Wilson Act, and recited the provisions of the Act of Congress, commonly known as the Webb-Kenyon Act, approved March 1, 1913, and thereafter in said bill of complaint charged that certain firms and corporations in the State of Maryland were violating said Act of the Legislature of West Virginia, and said Acts of Congress in the matter of shipping liquors from said State of Maryland into said State of West Virginia, in said three counties contrary to said Acts and laws, and charging further that said alleged illegal shipments of liquor into West Virginia were being made over the interstate line of railway of this respondent, from Cumberland, Maryland, into West Virginia, contrary to said laws, and praying in said bill of complaint for an order of said Court of Tucker County, granting an injunction to said State of West Virginia against this respondent, restraining this respondent from shipping any liquors from Maryland into said three counties of West Virginia, except under certain particularly enumerated requirements imposed upon this respondent.

And respondent further says that thereafter on the 11th day of August, 1914, upon the presentation of said bill of complaint of the

State of West Virginia, to the Honorable F. M. Reynolds, Judge of said Circuit Court of Tucker County, West Virginia, said Court granted said order of injunction against respondent, and filed and issued the same against respondent in the words following to-wit:

"Restraining and enjoining it, its agents and employes, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said County of Tucker, or elsewhere within the jurisdiction of the Court unless said defendant railway has first ascertained, by acting in good

28 faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said State; and from delivering liquors to any consignee in said county of Tucker, or elsewhere within the jurisdiction of the Court, unless said railway company has first ascertained, by acting in good faith, with due diligence and caution that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said State; and from delivering liquors to any person in said County of Tucker, or elsewhere within the jurisdiction of the Court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself, or by associating with others, in any manner aids, assists or abets in keeping or maintaining, and from delivering liquors within the county of Tucker or elsewhere within the jurisdiction of said Court, to any person, unless the consignee signs the defendant's liquor record in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said State in violation of any law thereof."

And this respondent now charges that on or about the 14th day of August, 1914, said injunction of said Court was duly served upon this respondent, and it now files herewith as part of this answer, a copy of said bill of complaint of the State of West Virginia, and of said order for said injunction granted by the said Circuit Court of Tucker County, in said State, marked, Respondent's Exhibits Nos. 1 and 2.

10. Respondent now charges that it must be perfectly obvious to this Court that respondent could not and cannot undertake to ship any liquors whatever in interstate commerce from the State of Maryland to said three counties in West Virginia, under the requirements



and restrictions set out in said injunction; that the performance by this respondent of many of said requirements is not only physically and financially, but psychologically impossible, especially said requirements that before accepting any such interstate shipment of liquor for transportation, respondent shall first ascertain by acting in good faith, and with due diligence and caution, that such liquors offered for shipment were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, without the intention by any person interested therein, to be received, possessed, sold or in any manner used in violation of any law of said State, and said requirement that before respondent should deliver any such liquors to any consignee in said three prohibited counties, it shall first ascertain by acting in good faith and with due diligence and caution, that such consignees ordered such liquor for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein, to be received, possessed, sold or in any manner used in violation of any law of said State, and said requirement that respondent should not deliver any such liquors to any person in said three prohibited counties, when such liquors were procured for said person or for himself and those associating with him, to be received or kept for the purpose of use or gift as a beverage or for any distribution or division among himself and those associating with him, at any place which is kept or maintained by himself by associating with others, or which he by himself or by associating with others in any manner, aids, assists or abets in keeping or maintaining.

11. Respondent now charges that by said requirements of said injunction, it is not only required, before it accepts any liquors for such shipments, to use all reasonable efforts in good faith, to inform itself as to whether said liquors were ordered by the consignees  
30 without solicitation of the consignor or others, and is not only required before it accepts said liquors for shipment to use all reasonable efforts to ascertain whether or not they are intended by the consignee for his own personal use, but by the requirements of said injunction, before accepting said liquors for shipment, this respondent is required to ascertain as a fact, and in short, to know, whether or not said liquors were ordered upon said solicitation and whether or not the consignee intends them for his own personal use, and these things this respondent is required to ascertain as a fact and to know before it even accepts the goods for shipment, and that in order to comply with this requirement respondent would be obliged to keep at its points of shipment in Maryland, and at each of its points of delivery along its railway line in said three counties of West Virginia, a large and extra force of detectives and investigators to ascertain said facts, said force of detectives, etc., to be ready at all said stations in Maryland and West Virginia, at a moment's notice to go out throughout the jurisdiction of said three counties, and throughout the several towns and places of shipment in Maryland, and in other States, to endeavor to ascertain as a fact whether said shipments were being made upon solicitation or were being

intended for uses other than the personal use of the consignees, and that the cost of keeping, paying and maintaining such a force of investigators would impose such an intolerable financial burden upon this part of the interstate commerce of respondent, that all profits it might receive by way of freight for said shipments over its line would be many times over consumed in the maintenance of said corps of investigators, and that as to said consignees, all the investigation in the world would not enable your respondent to ascertain as a fact, or to know, what use the said consignees in-

31 tended to make of said liquors, and that for psychological reasons this respondent never could ascertain from said consignees as a matter of fact what was their intention relative to the use of said liquors, because said investigators could not read the mind of said consignees and ascertain their intent and because said consignees themselves might at the time said liquors were offered for shipment by the consignor, intend to use it for their own personal use, and after receiving them change their minds, and devote said liquors to purposes unlawful under the law aforesaid, and this respondent not only says therefore that it is obvious on the face of said injunction that it is impossible for respondent to comply with said requirements before shipping said liquors, but charges as a fact, which will be proved at the hearing that the performance of all said conditions are, for the reasons aforesaid, impossible on the part of this respondent.

12. Respondent therefore says that it being impossible to comply with said requirements of said injunction, it is advised that said injunction amounts to an absolute prohibition on this respondent restraining it from shipping any liquors whatever from the State of Maryland or elsewhere outside of the State of West Virginia, into said three prohibited counties in the latter State, and for these reasons alone respondent now says that since the service of said injunction upon it, it has refused to ship over its line in interstate commerce from points outside the State of West Virginia, into said three prohibited counties, any intoxicating liquors of any kind whatever, including the said shipment of alcohol offered by the plaintiff, and has informed the plaintiff and all others offering said shipments that

as long as said injunction is in force and not dissolved or  
32 modified, respondent will continue to refuse all said shipments, whether or not they are claimed to be lawful as aforesaid under the law of West Virginia and the said Federal law, and now pleads and avers all the foregoing matters and things as a perfectly valid and lawful excuse at law or in equity for its refusal to accept plaintiff's shipment of alcohol, and for its notice to plaintiff that it would continue to refuse all further shipments of liquor from points outside of Maryland, into the prohibited counties of West Virginia.

This respondent having now fully answered the bill of complaint, prays to be hence dismissed with its costs.

BENJ. A. RICHMOND,  
*Sol. for Respondent.*

STATE OF MARYLAND,  
*Allegany County, To wit:*

I hereby certify that on this — day of September, 1914, before me, the subscriber, a Notary Public, in and for the county and State aforesaid, personally appeared Charles A. Steiner, Superintendent of the West Virginia Division of the Western Maryland Railway Company, the defendant in the above case, and made oath in due form of law that he is familiar with the matters of fact set out in the foregoing answer, and that as to all matters of fact set out in said answer they are true to the best of his information, knowledge and belief, and that as to all matters of belief therein set out, that he believes them to be true.

Witness my hand and Notarial Seal.

[NOTARY'S SEAL.]

GROVER J. DONAHOF,  
*Notary Public.*

My Commission Expires May 1, 1916.

33

RESPONDENT'S EXHIBIT No. 1.

Filed September 14, 1914.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, Who Brings Her Suit at the Instance of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a corporation Under the Laws of the State of Maryland, Duly Authorized to do Business in the State of West Virginia.

To the Honorable F. M. Reynolds, Judge of the Circuit Court of Tucker County:

The bill of complaint and prayer of the State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, against the Western Maryland Railway Company, a corporation under the laws of the State of Maryland, duly authorized to do business in the State of West Virginia.

1. Complainings, plaintiff says that she is a body politic and a sovereign state, and that the defendant, The Western Maryland Railway Company, is and was at times herein referred to, a corporation under the laws of the state of Maryland, duly authorized to do business in the state of West Virginia, and is a common carrier, operating in certain counties within the states of Maryland, Pennsylvania and West Virginia; that the counties in West Virginia wherein the defendant operates are Mineral, Grant, Tucker, Randolph, Barbour and Pocahontas; that said defendant railway company operates

34 freight and passenger trains over its lines, and has and maintains quite a large number of stations within said states aforesaid, at which stations it receives and delivers freight of all kinds and quantities; that among other stations in West Virginia so maintained are those at the towns of Thomas, Davis, Parsons and Hendricks, in the county of Tucker; that the main line of defendant railway company runs from the city of Baltimore, Maryland, to Elkins, West Virginia, passing through the city of Cumberland and the town of Westernport, said last named city and town both being in said state of Maryland, at which places the defendant has and maintains stations and offices, where it receives and delivers freight offered it for transportation.

2. Plaintiff further represents that at the general election held in the State of West Virginia in November, 1912, the people of said State ratified a proposed amendment to the constitution of said State, whereby that on and after the first of July, 1914, the manufacture, sale and keeping for sale of malt, vinous, or spirituous liquors should be prohibited in said State; that said amendment so ratified was and is in the words and figures following:

"SEC. 46. On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wines, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

3. Plaintiff further says that at the regular session of 1913, the legislature of West Virginia enacted chapter 13, Acts of 1913, the State Prohibition Law, in effect on and after July 1st, 1914, said act being enacted for the purpose of carrying into effect the provisions of the said constitutional amendment aforesaid.

35 4. Plaintiff further represents that under the laws of the State of West Virginia, on and since the first day of July, 1914, it has been unlawful to manufacture, sell, keep or store for sale, or offer or expose for sale, within said State, liquors as liquors are defined by Section one of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said State for any person, acting for himself, or by, for or through another, to manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for, any liquors, as liquors are defined by Section 1 of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said State for one to act as the agent or employe of the purchaser of liquors, as liquors are defined by said act; and further, that on and after the 1st day of July, 1914, in case of a sale of liquors, in

which a shipment or delivery thereof is made by a common or other carrier, the sale thereof shall be deemed to be made in the County wherein the delivery of such liquors is made by such carrier to the consignee, his agent or employe.

5. Plaintiff further represents that on and since the first day of July, 1914, it has been unlawful within said State, for any person to advertise or give notice, by signs, billboards, newspapers, periodicals, or otherwise, for himself or another, of the sale or keeping for sale of liquors, or to circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical, or other written or printed papers in which such advertisements or notices are given.

36 6. Plaintiff further represents that the Cumberland Brewing Company is a maker and manufacture- of beer, owning and operating a large brewery; the Cash Liquor Store is a liquor house, John A. Whitman is a liquor house, Smith and Roman is a liquor firm, James Clark Distilling Company is a distiller and seller of liquors, C. A. Hice is a retail jug and bottle liquor house, the German Brewing Company is a brewer and seller of beer, The Diamond Liquor House, all of said City of Cumberland, and Peter Weisengoff, a liquor dealer of said town of Westernport, all of whom, as well as others not named herein, are engaged in the business of either Manufacturing or selling, or both, liquors as defined by said act, and all and each are engaged in the effort to receive orders and make sales and shipments of liquors to citizens residing in the State of West Virginia, particularly along the line of the defendant railway company. That some of said firms and manufacturers, if not all, have in various ways sought to advertise or give notice of their business to citizens and residents of West Virginia, and have in various ways, circulated and distributed price lists, circulars and order blanks, soliciting orders for and advertising liquors to the citizens of West Virginia, thereby bringing to the attention of such citizens and residents the articles of liquor kept and stored for sale by them respectively, to induce citizens and residents of said State to give orders for liquors they otherwise would not have thought of giving; that for the purpose of delivering liquors to the citizens and residents of said State along the line of the defendant railway company, including the said county of Tucker, said persons and firms have shipped by defendant railway company such liquors to divers citizens and residents of West Virginia, for delivery to said citizens and residents at stations

37 on the line of said defendant railway, within the State of West Virginia, including citizens residing in the County of Tucker. That in addition to shipping liquors by the defendant railway company, said persons and firms aforesaid also have shipped such liquors by the American Express Company, an express carrier, operating over the line of the defendant railway company. And thereupon, and as illustrative of the liquor carried and delivered by the defendant railway company from liquor dealers in the State of Maryland to citizens and residents of the State of West Virginia, including citizens and residents residing at the town of Thomas in

the County of Tucker, within said State, plaintiff avers and charges that on one day, to-wit, the 3rd day of July, 1914, there was received at said City of Cumberland and town of Westernport for carriage and delivery by the defendant railway company to citizens and residents of the town of Thomas, said county of Tucker, a large number of different consignments of liquors, and which liquors were carried and delivered for the consignors to the consignees at said town of Thomas by the defendant railway company, as follows:

Cumberland Brewing Company, to R. Seionto, 2 kegs 16 gal. beer;  
 Peter Weisengoff, to Fucile Salvatore, 2 bbl. beer;  
 Peter Weisengoff, to Joe Zamon, 2 kegs beer, 16 gal.;  
 Peter Weisengoff, to Frank Kozele, 2 kegs beer, 16 gal.;  
 Peter Weisengoff, to Mike Grohauchi, 2 kegs beer, 2 bx. 2 gal. W.;  
 Peter Weisengoff, to Frank Gnojoke, 2 kegs beer, 1 gal. Wh'y;  
 Peter Weisengoff, to Joe Zupet, 2 kegs beer; 16 gal.;  
 Peter Weisengoff, to Jno. Rugel, 3 kegs beer, 24 gal.;  
 Peter Weisengoff, to Geo. Kozlonches, 2 kegs 16 gal.; 2 box 2 gal. Wh'y;

Cumberland Brewing Company, to C. Statthum, 2 bbl. 240 pt. beer;  
 Cumberland Brewing Co., to J. Rosulic 2¼ bbl. 16 gal. beer;

38 Cumberland Brewing Co., to J. Kozlicax, 2-¼ bbl. 16 gal. beer;

Cumberland Brewing Co., to Joe Gusodoric, 5-¼ bbl. 40 gal. beer;  
 Cumberland Brewing Co., to F. Klenrock, 4-¼ bbl. 32 gal. beer;  
 Cumberland Brewing Co., to P. Mone, 5-¼ bbl. 40 gal. beer;  
 Cumberland Brewing Co., to F. Garbacki, 4-¼ bbl. 32 gal. beer;  
 Cumberland Brewing Co., to J. Mtroga, 5-¼ bbl. 40 gal. beer;  
 Cumberland Brewing Co., to J. Milkrit, 2-¼ bbl. 16 gal. beer;  
 Cumberland Brewing Co., to F. Frederick, 5-¼ bbl. 40 gal. beer;

And the plaintiff further represents and charges that the defendant railway company, from the first day of July, 1914, to the 21st day of July, 1914, inclusive, received from liquor dealers, out of the State, and carried and delivered to citizens and residents at said town of Thomas, West Virginia, approximately three hundred separate consignments of liquors; and further, as illustrative of the disposition and efforts on the part of non-resident liquor dealers to sell and deliver liquors to citizens and residents of Thomas, plaintiff further represents that there were carried and delivered by the American Express Company, an express carrier operating over lines of the defendant railway company, within said period of twenty-one days aforesaid, approximately three hundred and fifty separate express packages of liquors to citizens and residents of said town of Thomas. And plaintiff further represents and charges that, in a greater or less degree, the defendant railway company has been and is receiving liquors from the aforesaid liquor dealers, as well as others, not herein named, for carriage and delivery to citizens and residents of the State of West Virginia, at the several stations of defendant in said State.

39 Plaintiff is advised and so charges that the sales of such liquors, under and by virtue of the laws in such cases made



and provided, were made at the place of delivery by the carrier to the consignee of such liquors, in all instances wherein such liquors were shipped by the consignors, upon orders solicited in any way by them from the consignees within the State of West Virginia, or when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the State of West Virginia.

7. Plaintiff further represents that by an act of the United States Congress, known as the Wilson Act, (26 Stat. 713, c. 728) it is provided:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

8. Plaintiff further represents that by act of the United States Congress passed subsequent to the Wilson Act, and known as the Webb-Kenyon Act (Act. Cong. March 1, 1913, c. 90, 37, Stat. 699) it was provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

40 And plaintiff further represents that she is advised and so charges that the defendant railway company, on and since the first day of July, 1914, could not, nor can it now, lawfully deliver any liquors to any persons in West Virginia, except to those who have ordered the same for their lawful, personal use, without solicitation on the part of the consignor, nor lawfully deliver any liquors to the consignees thereof when such liquors were or are intended by any person interested therein to be received, possessed, sold or in any manner used in said State in violation of any of the laws thereof. And thereupon plaintiff further says that she is advised and so charges that it was and is the duty of the

defendant railway, through its agents and employes, before acceptance of liquors from non-resident consignors for carriage and delivery thereof to consignees in West Virginia, to ascertain, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to the consignees for their own lawful, personal use, without intention by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the said State of West Virginia.

9. Plaintiff further says that she is advised and so charges that the defendant railway company, through its agents and employes, has been accepting, on and since July 1, 1914, and is yet accepting, (perhaps inadvertently) liquors from non-resident consignors for carriage and delivery thereof to consignees in the said State of West Virginia, among others being consignments of such liquors

41 to citizens and residents of said County of Tucker, without having first ascertained, by acting in good faith with due diligence and caution, from the consignors and consignees, respectively, whether such liquors were ordered by the consignees for their own lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance, carriage and delivery thereof by the defendant to the consignees, for their own lawful personal use without intent by any person interested therein to be received, possessed, sold, or in any manner used in said State of West Virginia in violation of any of the laws thereof; and that said defendant, through its agents and employes, has made delivery of such liquors to citizens and residents in the said county of Tucker, without having ascertained, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful, personal use without solicitation on the part of the consignors, and whether such liquors were to be received, possessed, or in any manner used by any person interested therein in violation of any law of said State.

10. Plaintiff further represents that on and since the first day of July, 1914, it has been unlawful in said state of West Virginia for any person to associate with others to aid, assist, or abet in keeping and maintaining any club house, or other place, in which any liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage, or for distribution or division thereof among the members of any club or association by any means whatsoever, and thereupon the plaintiff further says she is informed and so charges that at certain towns in West Virginia on the line of the defendant railway, including the said town of Thomas, liquors are procured by persons associating together for the purchase thereof, such liquors being ordered and shipped in the name of one of the parties so associating together, usually in the name of one known as

42 the "boarding boss", such liquors so purchased being intended for the joint use of those so associating together, the



individual members whereof are usually known as "boarders"; that such liquors are purchased out of a joint fund to which the "boarders" contribute and are received, usually, in the name of the "boarding Boss", although at times in the name of one of the "boarders", and are kept, stored and distributed at a common place kept or maintained by the "boarding boss" himself, or by the said "boarding boss" and those associating with him as "boarders", or by one of said "boarders" and those associating with him as "boarders" or by the "boarders" themselves, associating together for the purpose of use or gift, as a beverage, or for distribution or division among the "boarders"; and such liquors are there used or given away as a beverage by those who so associate together. And thereupon plaintiff is advised and so charges, as she is informed and believes, that liquors have been shipped by non-resident liquor dealers, carried by the defendant railroad company, and delivered by it to the "boarding boss", or member of an association as aforesaid; and particularly does plaintiff charge that the defendant railway company, by and through its agents, on or about the 24th or 25th day of July, 1914, delivered to one Tom Joby, a "boarding boss", at house No. 47 B, said town of Thomas, four eight-gallon kegs of beer and one gallon of whiskey, which liquor was received by said "boarding boss" for the purpose of use or gift as a beverage and for distribution or division among the "boarders" who had contributed either directly or indirectly, to a common fund for the purchase of said liquors, and who kept or maintained a common place, where such liquors were stored or kept, and distributed or divided among those associating together. And thereupon plaintiff further says

43 she is advised and so charges that on and since the first day of July, 1914, it has been and is the duty of the defendant railway company, by and through its agents, to make no deliveries of liquors to any person in West Virginia except to a person who ordered the same for his own lawful, personal use, and not for the use of others, particularly any association of persons associating for the purpose of purchasing liquors to be kept and stored at a place kept or maintained by them in the manner as aforesaid, and there used or given away as beverages or distributed or divided among those associating together.

11. Plaintiff further represents that she is advised and so charges that consignees of liquors have endeavored to, and probably have in some instances, procured deliveries thereof from the defendant railway company, at stations in the said county of Tucker, by the use of fictitious names and otherwise. And thereupon the plaintiff further says she is advised and so charges that it is and has been the duty of the defendant railway company, since the 1st of July, 1914, to deliver no liquors except upon the signing of the record by the consignee thereof, in his own proper person, and then only when the consignee has ordered the same for his personal, lawful use, with no intention that the liquor so delivered is to be received, possessed, sold, or in any manner used in said state in violation of any laws thereof.

12. Plaintiff is advised and so charges that notwithstanding that

the brewery and liquor dealers hereinbefore named are non-residents of the state, yet nevertheless they do not have the right, under the interstate commerce clause of the federal constitution, to solicit orders for liquors nor to sell liquors in the state of West Virginia, nor to ship liquors into the state of West Virginia, when the same are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of

44 the said state, and that the interstate character of such liquors, as advertised or sold by them, is divested by the Webb-Kenyon act in all instances wherein they advertise, solicit or sell liquors in the state of West Virginia or to any citizen thereof in the said state, when any such liquors are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state.

13. Plaintiff further says she is advised and so charges that it is the purpose of said brewers and liquor dealers aforesaid, as well as other outside brewers and liquor dealers, to advertise their liquors in the state of West Virginia, and to solicit in said state, from the citizens thereof, orders for liquors, and that they intend to ship into West Virginia by defendant railway company, the liquors advertised by them and which they have for sale, particularly along the line of the defendant railway in the state of West Virginia, regardless of the purpose or use the consignee may have respecting such liquors. That it is the purpose of the outside liquor dealers to ship their liquors over the line of the defendant railway to any person in West Virginia who may order the same without ascertaining, and regardless of, the purpose or use the consignee may have respecting such liquors, and that the defendant railway company has been and will continue to carry and deliver such liquors to such citizens and residents of such state, including those residing in said county of Tucker; and therefore to permit the defendant railway company to deliver such liquors is to make the same a common nuisance for the keeping, storing, selling and delivering of liquors within the state of West Virginia, if the defendant railway company is permitted to deliver such liquors to the consignees when the liquors are to be received, possessed, sold or in any

45 manner used by the consignee in violation of the law of the state of West Virginia.

14. Plaintiff therefore further represents that inasmuch as the outside liquor dealers are beyond the jurisdiction of the criminal courts of the state, and perhaps may therefore escape criminal prosecution under the laws of said state, she having no assurance that she can procure the persons of such outside liquor dealers for the purpose of trial, she is therefore advised and so charges that she has the right to invoke the aid of a court of equity to restrain and enjoin the defendant, The Western Maryland Railway Company, from delivering any consignment of liquors from outside liquor dealers to any point upon the line of said carrier or elsewhere in the state of West Virginia within the jurisdiction of the court, unless the said defendant, through its agents and employes, before acceptance of liquors from non-resident consignors, for carriage and delivery thereof to con-

signees in said county of Tucker, ascertain, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees thereof for their lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to consignees for their lawful, personal use, without an intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state of West Virginia.

In consideration of the premises, and inasmuch as plaintiff is without adequate remedy save in a court of equity, she therefore prays that she may be awarded an injunction against the

46 said defendant, The Western Maryland Railway Company, restraining and enjoining it, its agents and employes, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the court, unless said defendant railway company has first ascertained, by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere within the jurisdiction of the court, unless said railway company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the court, when such liquors were procured for himself or for himself and those associating with him, to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with

47 others, or which he, by himself, or by associating with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors within the county of Tucker or elsewhere within the jurisdiction of said court, to any person, unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof. And that the defendant, The Western Maryland Railway Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle

or deliver any liquors within the said county of Tucker, or elsewhere within the jurisdiction of the court, other than is consistent with the allegations and prayer of this bill; and may the defendants named in the caption of this bill be made parties defendant hereto; and may the plaintiff have all such other, further, general and special relief as the nature of her case may require or to equity may appertain.

And she will ever pray, etc.

STATE OF WEST VIRGINIA,  
Who Brings Her Suit at the Instance of Fred  
O. Blue, State Commissioner of Prohibition,  
By COUNSEL.

\_\_\_\_\_,  
*Counsel for Plaintiff.*

48 STATE OF WEST VIRGINIA,  
County of \_\_\_\_\_, To wit:

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition for the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

Taken, sworn to and subscribed before me this — day of August, 1914.

My commission expires on the — day of —, 19—.

\_\_\_\_\_,  
*Notary Public in and for the said County and State.*

49 RESPONDENT'S EXHIBIT No. 2.

Filed September 14, 1914.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, Who Brings Her Suit at the Instance  
of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation Under  
the Laws of the State of Maryland, Duly Authorized to Do Business in the State of West Virginia.

This day, in Vacation for the Circuit Court of Tucker County, came the plaintiff, State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, against The Western Maryland Railway Company, a corporation under the laws of the State of Maryland, duly authorized to do business in the state of West Virginia, and presented her bill, duly verified, to the undersigned Judge of the said Court, praying that she

may be awarded an injunction against the said defendant, The Western Maryland Railway Company, restraining and enjoining it, its agents and employes, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the court, unless said defendant railway has first ascertained by acting in good faith, with due diligence and caution that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to

50 the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignee in said county of Tucker, or elsewhere, within the jurisdiction of the court, unless said railway company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself, or by associating with others, in any manner aids, assists, or abets in keeping or maintaining; and from delivering, liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof, And that the defendant, The

Western Maryland Railway Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within the said county of Tucker, or elsewhere within the jurisdiction of the court, other than is consistent with the allegations and prayer of said bill.

And said bill, having been read and considered, the injunction as therein prayed for is hereby awarded, and the said defendant, The Western Maryland Railway Company, its agents and employes, are hereby enjoined and restrained as prayed for in said bill, as above set forth in this order, which injunction is awarded without bond required of the plaintiff.

It is further ordered that an attested copy of this order be served upon the said defendant, The Western Maryland Railway Company,

which service shall have the effect of enjoining the said railway company according to the prayer of said bill and the injunction hereby awarded. And the Clerk of the Circuit Court of Tucker County is hereby directed and order to enter this order in the Chancery Record book of the Circuit Court of Tucker county, as a vacation order.

Done in Vacation in and for the Circuit Court of Tucker county, at Keyser, Mineral County, West Virginia, this tenth day of August, nineteen hundred and fourteen.

F. M. REYNOLDS,  
*Judge of the Circuit Court of  
Tucker County, West Virginia.*

To Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County.

F. M. R.

Received and entered here, in vacation, this the 11th day of August, 1914.

Attest:

LAWRENCE LIPSCOMB, *Clerk,*  
By F. W. PRITT, *Deputy.*

A Copy. Attest:

LAWRENCE LIPSCOMB, *Clerk.*  
By F. W. PRITT, *Deputy.*

52 *Petition of the State of West Virginia to be Made a Party to this Case and Order of Court Thereon.*

Filed October 19, 1914.

In the District Court of the United States in and for the District of Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

To the Honorable John C. Rose Judge of the District Court of the United States for the District of Maryland, sitting at Cumberland, Maryland:

The Petition of the State of Maryland, a Body Politic and a Sovereign State, Tendered and by Leave of the Court Filed in the Above-entitled Cause.

Your petitioner, the State of West Virginia, respectfully represents:

1. That she is a body politic and a sovereign State.
2. That heretofore, to-wit, on the tenth day of August, 1914, she



presented her bill to the Honorable F. M. Reynolds, Judge of the Circuit Court of Tucker County, said State of West Virginia, (Tucker County being one of the counties composing the Sixteenth judicial circuit of said State) praying for order of injunction as  
53 therein set out, and a duly attested copy of said bill is now herewith filed, marked "Petitioner's Exhibit No. 1," and is prayed to be taken and read herewith as part hereof.

That said Judge of said Circuit Court of Tucker County, having considered said bill and the prayer thereof, on said tenth day of August, 1914, awarded injunction as therein prayed for. A duly attested copy of said order awarding the injunction is now here filed, marked "Petitioner's Exhibit No. 2," and is prayed to be taken and read herewith as further part hereof.

Petitioner further represents that she now here adopts the allegations set forth in said bill for all purposes as though the allegations therein set forth were herein set forth in extenso.

Petitioner further represents that the plaintiff, the James Clark Distilling Company, a corporation, on and since the first day of July, 1914, has by printed or written circular letters, order blanks and price lists, solicited citizens of the State of West Virginia, particularly citizens thereof residing in said Sixteenth Judicial circuit aforesaid, to give orders to said plaintiff, the James Clark Distilling Company, for intoxicating liquors. That the purpose of such letters, circulars, order blanks etc., was to procure from the citizens of the State of West Virginia, particularly those residing within said Sixteenth judicial circuit aforesaid, orders for intoxicating liquors to be filled by the plaintiff the James Clark Distilling Company; that the said James Clark Distilling Company intended to accept such orders and to ship such intoxicating liquors to such citizens aforesaid by the defendant, the Western Maryland Railway Company.

54 Petitioner further charges that the plaintiff, the James Clark Distilling Company, has been, on and since the first day of July, 1914, shipping intoxicating liquors into the State of West Virginia, to the citizens thereof, without any effort to ascertain the character, ages and habits of the person- who ordered the same, nor the purposes to which they intended to put such intoxicating liquors.

3. Petitioner further represents that, by provisions of the statute of your petitioner relative to intoxicating liquors in case of any sale, and the shipment of intoxicating liquors into the State of West Virginia, by common or other carrier, the sale thereof is deemed to be made at the county wherein the intoxicating liquors are delivered. That the statutes of your petitioner, respecting intoxicating liquors, forbid the sale of or soliciting of orders for any intoxicating liquors in the State, except the sale of pure grain alcohol, by wholesale druggists to retail druggists and by retail druggists upon prescription of reputable physicians or upon affidavit of the purchaser, but only then when to be used for medicinal, pharmaceutical, mechanical or scientific purposes; wine may also be sold under the laws of your petitioner when intended to be used for sacramental purposes. All

other intoxicating liquors, by the laws of your petitioner, are forbidden to be sold.

55 4. Petitioner further represents that in any event respecting any sale and delivery of intoxicating liquors made within her jurisdiction, the common carrier, carrying and delivering the same, is required to use good faith, due care and reasonable caution to ascertain that such intoxicating liquors are not to be received, possessed, sold or in any manner used by any person interested therein in violation of the laws of your petitioner.

5. Petitioner further represents that the plaintiff, the James Clark Distilling Company, made no effort whatsoever to ascertain the age, habits, or character of Floyd Rosier, the person named in the bill and who is alleged to have ordered the liquors in the bill mentioned from said plaintiff, the James Clark Distilling Company. And petitioner further represents that the plaintiff, the James Clark Distilling Company, made no effort whatsoever to ascertain or to inform itself of the purposes, lawful or otherwise, that said Rosier intended to exercise respecting the intoxicating liquors mentioned in the bill. And petitioner further represents that the plaintiff, the James Clark Distilling Company, has on and since the first day of July, 1914, been shipping intoxicating liquors into the State of West Virginia, particularly to citizens in said Sixteenth Judicial circuit aforesaid, which liquors were shipped into said State regardless of the purpose or use that the persons so receiving the same might make thereof. And petitioner further represents that the provisions of her prohibition statute are in exercise of her police powers for the protection of public health, peace and morals of her citizens and residents within her jurisdiction.

56 6. Petitioner denies that the plaintiff, the James Clark Distilling Company, is entitled to the mandatory injunction prayed for in its bill.

7. Your petitioner further most respectfully represents that in view of the allegations herein, that she should be permitted to intervene herein and be made a party to this cause, and she therefore prays that she may be permitted to file this petition and be made a party herein.

And your petitioner further prays that the plaintiff, the James Clark Distilling Company, may be denied the relief sought by its bill, and may your petitioner have all such other, further, general and special relief as the nature of her cause may require or to equity may appertain.

STATE OF WEST VIRGINIA,

*A Body Politic and a Sovereign State,*

By Her Counsel, FRED O. BLUE,

*Counsel for the State of West Virginia.*

57 STATE OF WEST VIRGINIA,

*County of Kanawha, To wit:*

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition of the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof;



that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

FRED O. BLUE.

Taken, sworn to and subscribed before me, this 17th day of October, 1914.

My commission as Notary Public expires on the 26th day of April, 1923.

[NOTARY'S SEAL.]

FRANK LIVELY,  
*Notary Public in and for the said  
County and State Aforesaid.*

58-79 In the District Court of the United States for the District of Maryland, at Cumberland, Md.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

Upon the foregoing petition, exhibits and affidavit it is ordered by the District Court of the United States, for the District of Maryland, this 19th day of October, 1914, that said petitioner, The State of West Virginia, be permitted to file said petition and be made a party in the above entitled cause as prayed in said petition, provided no cause to the contrary be shown on or before the 29th day of October, 1914; a copy of said petition and this order shall be served forthwith by the Clerk upon the plaintiff herein or its counsel.

JOHN C. ROSE,  
*District Judge.*

\* \* \* \* \*

80 *Order of Court Making the State of West Virginia a Party  
Defendant.*

Filed December 9, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

It appearing to the Court that no cause has been shown why the petitioner, the State of West Virginia should not be made a party in the above entitled cause, as prayed in its petition filed herein on

the 19th day of October, 1914, although due service of said petition and Order of Court passed thereon on the 19th day of October, 1914, was admitted,

It is thereupon ordered by the District Court of the United States for the District of Maryland, this 9 day of December, 1914, that said petitioner, The State of West Virginia, be, and it is hereby made a party defendant in the above entitled cause as prayed in said petition.

JOHN C. ROSE,  
*District Judge.*

81 District Court of the United States District of Maryland, at  
Cumberland, Maryland.

No. 2. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-  
plainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,  
Defendant.

*Transcript of Evidence.*

GEORGE J. GOCKE, a witness of lawful age, produced by the plaintiff, being duly sworn and examined by Mr. Walter C. Capper, attorney for Plaintiff, stated that he was bookkeeper for the James Clark Distilling Company, plaintiff in this case, and he identified a paper dated Parsons, West Virginia, August 19, 1914, as being an order received by the James Clark Distilling Company at Cumberland, Maryland, through the United States mail from Floyd Rosier of Parsons, West Virginia. Thereupon the following occurred:

Q. Will you state what knowledge you had in reference to the uses that Rosier intended to put that alcohol to?

A. My knowledge of the order was he intended the alcohol for his own personal use.

(COURT:)

Q. This is an order for alcohol in the form of pure spirits, or is it alcohol in some other form?

A. It is 188% proof alcohol.

(COURT:)

Q. That is pretty near pure alcohol?

A. Yes, sir.

(COURT:)

Q. Whiskey is about 100% proof?

82 A. Yes, sir, or less.

Q. Pure grain alcohol, is it?

A. Yes, sir.

Q. Will you state whether or not the James Clark Distilling Company, or any of its agents, in any manner solicited any order from Mr. Rosier?

A. They certainly did not.

Q. And you say they had no knowledge whatever to what use he intended to put that shipment?

A. Other than his statement, that he intended to put it to his own use.

Q. How much alcohol does the order cover?

A. Four quarts—one gallon.

Q. And the price was?

A. Four dollars.

Q. Did the price accompany the order, and if so, in what way?

A. The money accompanied the order in the shape of a U. S. Postal Money Order.

Q. And that is exhibited here?

A. Yes, sir.

On Cross-examination by Mr. Benj. A. Richmond, attorney for the Western Maryland Railway Company, defendant, witness stated that Mr. Rosier stated that he wanted the alcohol for his personal use, but that witness had no knowledge as to what way he was going to personally use it. Outside of a use for mechanical purposes, witness would not use it for any purpose except rubbing, because it is not fit to drink, being too strong. The order speaks of 188% proof,

83 which is the percentage or strength of the alcohol. It would have an intoxicating influence if a man should drink it.

The James Clark Distilling Company did not know Rosier before he sent this order in and witness did not know whether that company had had business dealings with him before. Rosier sent the order on a plain piece of paper and witness did not know how Rosier got the address of the plaintiff firm. That firm did not employ any traveling salesmen to solicit business in that part of the country. The plaintiff tried to ship the order by American Express and they refused to ship it; they then tried to ship it by railroad and they refused it.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that he understood that pure grain alcohol is used to increase the strength of certain intoxicating beverages. At the time this order was received the plaintiff company did not publish advertisements in newspapers, but had published such advertisements, possibly a month or two months before. Witness could not say whether this order was the result of some such advertisement previously published. After the first of July, 1914, plaintiff company did not publish any advertisements in West Virginia. Witness did not know how Mr. Rosier knew that the price of the alcohol was \$1.00 a quart; that Rosier may have given previous orders. Witness did not have any knowledge that Rosier intended the alcohol for his own personal use except what Rosier stated in his letter.

Thereupon Mr. Fred O. Blue, State Commissioner of Prohibition

of the State of West Virginia moved to be made a party defendant in each case, which motion was granted and Mr. Blue proceeded to further cross-examine the witness. On such cross-examination the witness stated that the general business of the James Clark Distilling Company is the distillation and sale of whiskey. That company does not manufacture alcohol but only rye and malt whiskey. Does not sell any beer, but sells quite a lot of the alcohol such as was ordered by Rosier. Since the first of July, 1914, that company has sent written or printed circulars into the State of West Virginia to solicit business, but not to any great extent. Witness could not say whether any of these circulars had been sent into Tucker County or whether Rosier had received any of them. These order blanks and solicitations gave the prices of all the different grades of liquor and alcohol sold by the plaintiff company. Witness does not know whether any such order blanks sent into West Virginia since the first of July came back to the company with orders. Witness believes that the kind of alcohol mentioned in Rosier's order could be diluted and used as a beverage, but does not know whether in fact it is so used. Witness cannot state whether any other shipments were made after the first of July to Rosier, or the amount of liquors that the plaintiff company has shipped into the State of West Virginia since the first of July.

85 JOHN KEATING, a witness of lawful age, produced by the plaintiff, being duly sworn was examined by Mr. Walter C. Capper, as follows:

He is Vice-President and Treasurer of the James Clark Distilling Company which is engaged in the distilling and wholesale and retail liquor business. Witness had no knowledge of the order of Floyd Rosier except that it came in regular mail order business, and as that business is a cash business it does not become part of the company's record, and witness cannot say whether that company had made any previous shipments to Rosier or ever received any other order for him. Alcohol of the kind covered by the order is used for rubbing purposes and also for drinking, by mixing a gallon of such alcohol with a gallon of water. Sometimes they put it on a stove and put sugar in it, so they get whiskey for fifty cents a quart. That is to say they get it rectified instead of pure neutral spirits. They buy a gallon of alcohol and reduce it and so get alcohol rectified, but without the whiskey flavor. Witness does not know whether the firm solicited this order, unless it came in from advertising which had been carried on for forty years. The James Clark Distilling Company having been in business for forty years and having advertised for mail order business for thirty years. The company is a Maryland corporation with its principal office located in Cumberland. Since the first of July the company had been carrying on its regular mail order advertising in West Virginia. The custom of the company is to send out between fifty and one hundred thousand circulars every year. They get the names from the Clerks of the Courts of the various counties showing registered voters of their county, with the post office addresses, and also purchase names from

86

companies that make it a business of going from court to court and getting the names.

Cross-examination by Mr. BENJ. A. RICHMOND, Attorney for Western Maryland Railway Company:

The one hundred thousand circulars of which witness spoke of as having been sent out during a year were not sent to West Virginia alone, but also to Maryland, Virginia and Pennsylvania. The circulars sent to points in West Virginia since the first of July, 1914, are the same as circulars sent to the same points prior to July 1, 1914. The company does not make beer, but manufactures spirituous liquors and also buys spirituous liquors. The sale of alcohol forms quite a large part of the company's usual business. Witness had never heard of Rosier before receiving this order marked for his personal use. Witness did not know what he really wanted to use it for, he may have wanted it to drink and he may have wanted it to rub himself with. Such alcohol is also used for the purpose of fortifying beers or wines. Plaintiff company attempted to ship the liquor by American Express but they refused to accept it and they then applied to Western Maryland Railway Company which also refused to accept it. Application was made to the Agent of the Railway Company and also to the Superintendent by the transferman of the plaintiff company. Witness understood that the defendant companies gave as a reason that they would not accept the shipment that an injunction had been issued against them. The James Clark Distilling Company has a branch house in Washington, and did have one at Parkersburg, West Virginia, until June 30, 1913. It manufactures liquors just outside of Cumberland.

87 The company's mail order business had been going on for thirty years. The order from Rosier was accompanied by a post office money order to pay for the shipment. Witness does not know how Rosier came to know that four quarts of alcohol would cost four dollars, unless he got it from one of the company's circulars. Witness could not state any manner in which the Western Maryland agent at Cumberland or at Baltimore, when applied to to ship liquors could ascertain whether the order for the liquor was given upon solicitation by the plaintiff company. If the railway company were required to ascertain whether Rosier wanted this liquor for his personal use, or whether he had ordered it on solicitation, witness does not know how they could do so. Witness stated that when a man says on the order that he wants it for his personal use "That is the only knowledge we have". In answer to a question by the Court, witness stated that the James Clark Distilling Company had not sent any circulars into West Virginia since the first of July advising applicants that the company would be unable to ship orders unless wanted for their personal use. The company until within thirty days of the trial had never kept the names of customers from whom orders were received. Names had always been obtained from the Clerks of the Courts and the company kept no list.

On cross-examination by Mr. John Philip Hill, attorney for American Express Company, witness stated and it was admitted by

plaintiff that the shipment was offered to American Express Company and refused because of an injunction against it, copy of said injunction being filed as an exhibit with the answer of the  
88 American Express Company that said injunction was duly served on the express company prior to its refusal to accept the package. The same admission was also made in respect to the Western Maryland Railway Company.

On further cross-examination by Mr. FRED O. BLUE, witness testified as follows:

Q. Upon direct examination you were asked as to what uses the consignee might make of this alcohol he ordered. Don't you know that also up in that country that alcohol being diluted could be used for speak-easy purposes?

A. That might be true. I have never been to one of their speak-easy-s, and I don't know what they use it for.

Q. In other words, while alcohol might be used for lawful purposes by Rosier, he also might use it for unlawful purposes?

A. Yes, I suppose he could.

Q. In view of that fact, when you received this order from a man unknown to you, did you seek to inform yourself as to what kind of a man he was, and the purposes to which he might put the alcohol?

A. We had no interest in Mr. Rosier. He was twenty-one years of age, and I have seen people drinking pure alcohol in West Virginia twenty-five years ago.

(COURT:)

Q. I presume you didn't know whether he was twenty-one or not?

A. We never get anything but a list of registered voters.

89 (COURT:)

Q. Was he on the list?

A. I don't know whether he was or not.

Q. You didn't know when you accepted this order whether Rosier was a minor or a man of full age?

A. No, we did not, and we didn't know whether he was a minor or not. If we had known he was a minor, we wouldn't have shipped it.

Q. Did you know whether he was a man of intemperate habits?

A. No.

Q. Did you know whether he was a man given to the use of narcotic drugs?

A. We didn't know anything about the man.

Q. Did you seek to ascertain these facts from this stranger, whether he was a man of intemperate habits or given to the use of narcotic drugs, or was a minor?

A. I don't think it is required of us to find out from a man his general reputation.

(Court instructs witness to answer the question.)

Q. (Question repeated by stenographer.)

A. No.

Q. Are the circulars or were the circulars you sent into West Virginia printed ones of a general kind?

A. Yes, sir.

Q. Do you yet have some of those same printed circulars, the same kind that you sent into West Virginia since July 1, 1914?

A. That is, if any was sent.

90 Q. Upon your direct examination, you stated you had sent circulars into West Virginia, and I believe since the first of July, 1914?

A. I don't know whether we have since the first of July, but I guess we have; we have that business going on all the time.

Q. I will ask you to state whether or not you did send circulars and order blanks into West Virginia since the first of July, 1914?

A. I suppose we did. Personally, I couldn't say. I didn't see the circulars enclosed, and I didn't address them and didn't mail them.

Q. Who is connected with your Company who could tell us that?

A. I think I am safe in saying we did.

Q. Can you produce for the purposes of the Court and counsel, and make a part of this record some of the same kind of printed circulars and some of the blanks that you sent into West Virginia since the first of July, 1914?

A. I think so.

Q. Will you do so?

A. If our counsel requires it and wishes it.

(Papers produced—papers and blanks asked for produced by the witness.)

(COURT:)

Q. What is the reason on the back of this circular you have printed, "We put up whiskey in barrels and half barrels with or without labels at customer's option?"

91 A. Before the Prohibition law went into effect, in local option counties we had quite a business in whiskey put up in barrels and half barrels, and they took out a Government license, and have it bottled under a hundred different brands.

(COURT:)

Q. And if it was an honest man, he would prefer that the barrel be labeled?

A. Yes, sir, not the barrels, but the bottles; we had to brand the barrels on the outside.

Q. Since the first of July, your Company has been shipping whiskey into the State of West Virginia?

A. Yes, sir.

Q. The same as before?

A. Yes, sir.

Q. You made no effort to ascertain the character and ages and habits of the persons who ordered it, nor the purposes to which they intended to put the liquor, did you?

A. No, I don't think we have. I will produce circulars to show



that the man must state he is twenty-one years of age, and wanted it for his personal use.

Q. When did you get those?

A. I don't know whether any of them are out or not. They are in the hands of the printer.

Q. Were any notices published by you in the papers of West Virginia, that the applicant will have to be twenty-one years of age, and that the liquor is for his own use?

A. We have not, but we are getting the circulars up as fast as possible, and will have printed under the man's name that  
92 "I am twenty-one years of age, and this is for my personal use."

(COURT:)

Q. You haven't sent those out yet?

A. I don't think so; I am not sure.

Q. If your Company received an order for as much as a barrel of whiskey from West Virginia, would you have shipped it without making inquiry, as to what the person ordering it intended to make of that liquor?

A. I think we would.

Q. You would have shipped it then?

A. Yes, sir.

Q. Without making inquiry?

A. Yes, sir.

Q. You have been shipping into the counties of West Virginia a great deal of liquors since the first of July?

A. Yes, sir.

Q. In large and small quantities?

A. Not very large quantities; the quantities have been small since the first of July.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that at the time this shipment was offered to American Express Company, witness did not believe that that company had any more knowledge of the order for the alcohol or the person who made it than the witness himself had.

93 Mr. STANTON ENNES, called as a witness for defendants being first duly sworn and examined by Mr. Benj. A. Richmond, attorney for defendant, The Western Maryland Railway Company stated that he was General Superintendent of that company with headquarters at Hagerstown. Beginning at Cumberland that company has on its line extending from Cumberland, Maryland, into the State of West Virginia regular stations and agents at the following points; Keyser, Westernport, Luke, West Virginia Central Junction, Shaw, Blaine, Potomac Manor, Harrison, Elk Garden, Schell, Gorman, Bayard, Dobbin, Henry, Thomas, Douglas, Hendricks, Davis, Hambleton, Parsons, Montrose, Elkins, Belington, Durbin, Beverly, Mill Creek and Huttonsville. Parsons is in Tucker County, West Virginia; from Tucker County to Cumberland the road runs

through Grant and Mineral Counties. The company has a number of stations in the State of Pennsylvania where it receives shipments in Franklin, Adams, Fayette and Somerset Counties, and also quite a number of stops in Maryland where it receives shipments, such as Westminster, Hagerstown and Cumberland. Witness has read the terms and requirements of the injunctions granted by Judge Reynolds of Keyser and thinks it is physically impracticable for the company in the shipments of liquors to observe the terms of the injunction. When witness first saw the injunction—and in an effort to comply with it he thought that in doing business with an old reliable house like the plaintiff in this case the railroad company might accept the statement of the shipper that so far as solicitation was concerned the shipper had complied with the law. But it occurred to witness

that if the shipper had advertised in a Cumberland paper or  
94 some outside paper and these papers were carried into West Virginia that that would be a solicitation, and that further when it came to doing business with a man not so well established as plaintiff in this case the railroad company was absolutely helpless in determining whether the sale had been solicited or not, and when it came to ascertaining whether the receiver of the goods was going to use them in violation of the West Virginia law, witness thought it impossible to comply with the terms of the injunction. The rate on the shipment to Parsons, West Virginia would have been thirty cents and it would mean that at all stations in West Virginia the railroad company would have to take means to carry out these instructions, and witness did not see how the company could do it in a commercial way, taking into consideration the rates. Witness supposed the company in order to comply with the terms of the injunction would have to maintain someone to determine who the receiver was and what use he was going to make of the liquor. Witness gave the thing up as impracticable and instructions were given that the company could not comply with the law, (the injunction). The difficulty would be applicable at all stations in Maryland and Pennsylvania, where the company received goods. The company has not a sufficient force of detectives at stations in these three states to determine these questions and the costs of maintaining such a force would run into prohibitive figures.

Cross-examination by Mr. LAWRENCE MAXWELL, attorney for plaintiff:

Witness issued a verbal order against the reception of interstate liquor into West Virginia; this order absolutely forbade the receipt of any interstate shipment of liquor into Grant, Tucker and Mineral Counties. It was issued a day or two after notice of the in-  
95 junction and included all liquor delivered to the railroad company by a shipper or a connecting carrier. It was an absolute refusal to carry interstate shipments of liquor into those counties without regard to the quantity or any other condition or circumstance. The injunction was dated August 11th and this order was issued a day or two after the injunction. The witness has no knowledge that the company knew that the injunction was awarded.

Does not know whether it was awarded ex parte or not. The company took no steps to have the injunction modified or vacated. Mr. Richmond as counsel for the company under authority of the witness ordered the shipments stopped.

96 WALTER A. YINGLING, a witness for defendants, being examined by Mr. Benj. A. Richmond, testified that he was freight agent at Cumberland for defendant, The Western Maryland Railway Company, and that after the injunction in Tucker County had been served he received instructions from Mr. Richmond, as counsel for that railway company not to ship any liquor into Grant, Tucker and Mineral Counties, West Virginia, and that none had been shipped. The railway company carries liquor for personal use into other counties in West Virginia from Cumberland when the order states that the liquor is for personal use and there is "nothing suspicious about it". Witness remembers the gallon of alcohol involved in this case being brought into his office for shipment sometime after August 14th, after the injunction had been served and after witness had received the instructions above noted. The shipment was brought to the railway company's freight office by Hirshman's transfer, and was accompanied by three or four gentlemen who wanted the witness to accept it for shipment to Parsons in Tucker County, West Virginia. Witness did not accept the shipment and gave as his reason for not accepting it that he had instructions from his Superintendent through General Counsel for the company, that on account of the injunction issued by Judge Reynolds the railway company was prohibited from accepting any liquor shipments for Grant, Tucker and Mineral Counties. But for these orders and the injunction, witness probably would have accepted the shipment. There was nothing suspicious about the shipment or the order; on the face of it it looked like a bona fide order. One of the gentlemen stated that he had offered the shipment to the Traffic Agent, Mr. Getty, and also to the Superintendent, Mr. Steiner of the Railway Company.

97 On cross-examination by Mr. Capper, counsel for plaintiff, witness stated that he refused the shipment solely because he had received orders from his superiors to receive no shipments of liquor for those three counties; that the plaintiff showed him the order and if he had been free to act would not have regarded this shipment as presenting anything suspicious.

Thereupon defendant, American Express Company offered in evidence Exhibit No. 1 filed with its answer. Thereupon the following occurred:

Mr. MAXWELL (Counsel for plaintiff): "You admit that your Company has made no effort to dissolve the injunction, and that the injunction was issued ex parte?"

Mr. BLUE (Representing the State of West Virginia): "It was issued as a preliminary injunction and no steps taken by the Defendant in either case."

Mr. RICHMOND (Counsel for Western Md. Railway Co.): "The Western Maryland has not entered an appearance in Tucker County,

I don't think. They have made no motion to dissolve the injunction."

Mr. MAXWELL: "Filed no answer?"

Mr. RICHMOND: "Filed no answer, and just stopped right there and obeyed the order."

Mr. MAXWELL: "The same is true of the American Express Company?"

Mr. HILL (Counsel for defendant, American Express Co.): "Yes, sir."

Mr. MAXWELL: "And you refused to ship, absolutely refused to ship?"

98 Mr. HILL: "Yes sir."

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 8th day of February, 1915.

FRED O. BLUE,

*Counsel for the State of West Virginia.*

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 10th day of February, 1915.

BENJ. A. RICHMOND,

*Counsel for The Western Maryland Railway Company.*

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 11th day of February, 1915.

JOHN PHILIP HILL,

*Counsel for American Express Company.*

Approved Feb. 11", 1915.

JOHN C. ROSE,

*U. S. District Judge.*

99 PLAINTIFF'S EXHIBIT No. 1.—JOHN KEATING.

Filed September 30, 1914.

*Report.*

On results of examination of a sample of "Braddock" Rye Whiskey received from The James Clark Distilling Co. of Cumberland, Md. The sample contains 46.7 per cent. of alcohol by weight.

"It leaves on evaporation a fixed residue representing 102. grains per wine gallon, of which 4.1 grains is mineral matter. The acid present is equivalent to 11 per cent. counted as acetic acid. Amylic alcohol is present to the extent of a mere trace only. Tannin in minute amount and a little of a caramel like or "extraction" substance, are present—also others in minute quantity. No sulphates. No heavy metals, such as copper, lead or zinc. The sample appears to be a sound, genuine whiskey, free from deleterious foreign substances and free to a more than usual extent from amylic alcohol."

J. H. MALLET.

(Here follow fac-simile circulars and labels marked pages 100 to 104.)

**CHARTS**

**TOO**

**LARGE**

**FOR**

**FILMING**





05

*Opinion of the Court.*

Filed December 18, 1914.

In the District Court of the United States for the District of  
Maryland.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,  
a Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

ROSE, *District Judge:*

Both the plaintiff and the defendant are Maryland corporations. the interposition of this court is invoked for the protection of rights said to be given by the Constitution and laws of the United States. The defendant operates a railroad between Cumberland, Maryland, and various stations in the counties of Mineral, Grant and Tucker, West Virginia, among them being the town of Parsons. On July 1, 1914, there went into effect an act of the legislature of the latter State commonly known as the Yost law. It prohibits, except for medicinal, pharmaceutical, scientific, mechanical or sacramental purposes, the manufacture, sale or offer for sale of intoxicants and the soliciting or receiving of orders for them. It contains many provisions intended to make evasion difficult and dangerous. Penalties are imposed on those who by themselves or in association with others maintain any club-house or other place in which liquor is received or kept for the purpose of use, gift, barter or sale as a beverage, or for distribution or division among the members of any club or association. Section 8 provides in part that—

106 "If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise \* \* \* of the sale or keeping for sale of liquors, or shall circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, shall be guilty of a misdemeanor."

Another section requires common carriers to keep books in which shall be entered the name of every person to whom liquors are shipped and the amount and kind thereof, together with the date of delivery and by and to whom delivered. Every consignee must in person sign his name to such record.

Within a few weeks after the act went into effect the State thought it had reason to believe that systematic attempts to evade its provisions were being made by various residents of the counties named. It accordingly, as authorized by law, sought the aid of its Circuit Court having jurisdiction in them. It filed a bill against the com-

pany, which is the defendant in this cause. It alleged various facts which strongly tended to show that the defendant was delivering great quantities of liquor to many different persons in the town of Thomas and its neighborhood, and that a number of these shipments were of such quantities as to make it highly improbable that they could have been intended solely for the personal use of the consignees. It charged that much of this liquor had been shipped to boarding bosses and other persons to be, in violation of law, by them distributed to their boarders or associates. It said that the defendant was accepting shipments and making deliveries of liquor without exercising due care to ascertain that they were not intended to be used in violation of its laws. In accordance with the prayer

of this bill an ex parte injunction was issued which, among other things, enjoined the defendant from accepting for transportation or delivery to anyone in the three counties in question any liquors unless it had first ascertained "by acting in good faith with due diligence and caution, that such liquors were ordered by the consignees for their lawful personal use without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereat by the said defendant to the consignees for their lawful personal use without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said State." It was further enjoined from delivering any person in the counties named any liquors procured by the consignee, by him and those associated with him "to be received, kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him, at a place which is kept or maintained by himself or by associating with others, or which he by himself or by association with others in any manner aids, assists or abets in keeping or maintaining." The decree, moreover, prohibited delivery to any person "unless the consignee signs the defendant's liquor record in his own proper person and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said State of West Virginia in violation of any law thereof."

So soon as this injunction was served upon the defendant it determined to refuse, and thereafter did refuse, to receive any shipments of liquor for transportation to any station in those counties.

It says that if it attempted, before accepting such shipments or before making such deliveries, to obtain the information required by the order of the West Virginia court, it would be compelled to employ an army of detectives and investigators which would cost it far more than the gross freight it would receive for the transportation of the merchandise in question.

The plaintiff is a liquor dealer in Cumberland. It has a large and profitable trade in the portion of West Virginia included within those counties. It is also one of the concerns which the State of West Virginia in its bill of complaint in its own court speci-

mentioned as shipping liquors in large quantities to the town of Thomas and its neighborhood. Both before and after the going into effect of the Yost act it has through the mails systematically distributed price-lists and solicited orders from residents of that part of the State. With its price-lists and soliciting circulars it sent out order blanks to be filled up and signed by prospective purchasers. In these blanks there is a clause stating that the liquor is intended for the personal use of the individual giving the order.

In August, 1914, one Floyd Rosier, a resident of the town of Parsons, by one of these order blanks directed the shipment to him by the plaintiff of four quarts of alcohol and sent a post-office money order for Four Dollars in payment therefor. The plaintiff packed the goods for shipment and tendered them to the defendant for transportation. In accordance with the determination, at which, as before stated, it had arrived, the defendant refused to receive or transport the package and announced that it would refuse to accept any intoxicants for delivery in the territory in which the injunction was operative. The plaintiff thereupon instituted these proceedings. It seeks a mandatory injunction to compel the  
109 defendant to transport all liquors ordered, without plaintiff's solicitation, by Rosier and other customers for their own personal use. At its request, and with the consent of all parties, the State of West Virginia has been made a party to the suit.

Only two questions in this case interest the defendant. It fears that it may be commanded to do something for the doing of which the State court will punish it, and it objects to spending a large sum of money to keep other people from evading the liquor laws of West Virginia.

The voluntary appearance of the State disposes of the former. It was the plaintiff in its own courts. It alone can complain of any disobedience of the decree there passed. It has come into this proceeding and will be bound by whatever is properly done herein.

The expenses to which the defendant may lawfully be put in connection with the shipment and delivery of intoxicants in West Virginia depends upon the degree of care which it may be required to exercise to prevent others using its facilities to break the laws of the State. The controversy between the plaintiff and the State is more far reaching and will be first passed upon.

At the hearing the counsel for the State argued, first, that any shipment into West Virginia by a seller to a buyer of intoxicants was prohibited. Second, that even if that was not so any such shipment was forbidden if the seller had by mail or otherwise solicited the order for it. The first contention was based upon the construction which the State put upon a clause of section 3 of the act, which reads—

"In case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

110 The sale of intoxicants in West Virginia is prohibited. Liquor which a resident of West Virginia orders from out of the State is usually delivered to him by a common carrier. If he has bought it the State says that the law declares that the sale has taken place in the county in which he lives.

Such an interpretation of the statute cannot be accepted. The provision quoted does not make illegal anything not otherwise forbidden. All that it does or was intended to do was to make certain the county in which those who had offended against its other provisions should be prosecuted. The State could not forbid the sale of liquors in Maryland, nor could it say that what by the general law was a completed sale in Maryland should be held to have been made in West Virginia.

American Express Co. v. Iowa, 196 U. S., 133.

If it had wished to keep citizens of West Virginia from obtaining liquor even for their own personal use from outside the State, and had the constitutional right to do so, it might have made it an offense for anyone to order them or to receive or have them. There is nothing in the act, however, to indicate that the State had any objection to anyone obtaining liquor for his own personal use provided he can do so otherwise, than by, within the State, buying or making it.

It follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by anyone interested therein to be received, possessed or used in violation of any law of that State.

Does the fact that such order has been solicited through the mails by a non-resident dealer in liquors make the transaction, which would otherwise have been lawful, illegal? One may solicit  
111 in writing as well as by word of mouth. Such a solicitation is made at the place at which in pursuance of the intent of the person making it the written communication is delivered to the person solicited.

United States v. Thayer, 209 U. S., 39.

That the letter is mailed in another State from that at which it is to be delivered does not necessarily prevent the latter state from punishing the sender if it can catch him.

In re Palliser, 136 U. S., 257.

It may be that the right to inflict punishment in such cases may be exercised only when the letter is sent in furtherance of something which the common moral sense of mankind regards as criminal, and does not exist when the thing, aided by the letter, would be in itself indifferent had it not been made criminal by local legislation.

Adams v. The People, 1 N. Y., 175.

Into these niceties it is unnecessary to go. Judge Keller has held that the Yost act reasonably construed does not attempt to prohibit

the solicitation of liquor orders by means of communications mailed from without the State.

West Virginia v. Adams Express Co. et al. (as yet unreported).

It seems only fair to presume that if the legislature had wished to deal with that phase of the problem it would have used language which would have made its purpose plain. I therefore agree that the West Virginia law has not attempted to prohibit such method of soliciting. Whether it has a constitutional right to do so if it chooses need not be here decided and I intimate no opinion as to it.

The Federal courts are, of course, bound by the construction which those of the State put upon its own statutes. I do not understand, however, that such rule requires national tribunals to accept the issue by a State court of first instance of an injunction upon an ex parte application as an authoritative construction of the applicable State legislation.

112 The defendant in this case makes no objection to the requirement that it shall keep certain kinds of delivery books. It is consequently unnecessary to inquire whether the somewhat narrow construction put upon the Webb-Kenyon act by a number of State courts of last resort, in such cases as *Adams Express Co. v. Commonwealth*, 157 S. W., 908, *Palmer v. Southern Express Co.*, 165 S. W., 236, *Van Winkle v. State*, 91 Atl., 385, or that in effect given to it by Judge Bean in *United States v. Oregon Washington Rail Navigation Co.*, 210 Fed., 378, is the sounder interpretation of the intention of the Congress which passed it. It would be even more beside the mark to pass upon the soundness of plaintiff's contention that a State cannot validly prohibit the possession by an individual of intoxicants for his own personal use. A number of courts of high rank have so held.

*State v. Gilman*, 33 W. Va., 146;

*Commonwealth v. Campbell*, 133 Ky., 50;

*Eidge v. City of Bessemer*, 164 Ala., 599.

On the other hand, it is clearly settled that he may be constitutionally prohibited from either buying or making it within the State. As every State in the Union has the like right, and as it is at least possible that Congress may validly prohibit its importation from abroad, the right, if it exists, may be lawfully made almost impossible of exercise.

In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the State. It has no right to accept for shipment, or to deliver

113 in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that State. It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the State

law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agents and employees who handle such shipments for it must keep their eyes open and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law.

A decree may be drawn in accordance with the conclusions herein stated.

114

*Decree.*

Filed December 24, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

No. 2, Equity Docket.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,  
a Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

This cause came on to be heard at the September Term of this Court, held in Cumberland, Maryland, upon the bill of complaint, the answer of the defendant, The Western Maryland Railway Company, and the petition of the State of West Virginia, a body politic and a sovereign State, to be made a party defendant herein, and the order of this Court making the said State of West Virginia a party defendant, and the testimony and proofs in the case, and was argued by Counsel.

It is thereupon, upon consideration of the same for reasons stated in written opinion which opinion is now here filed and made part of the record, this 24 day of December, 1914, ordered, adjudged and decreed by the United States District Court for the District of Maryland, that The Western Maryland Railway Company, a corporation, defendant herein, its agents, servants, employees and officers, and each of them, be and they are hereby commanded and enjoined to cease refusing to accept for transportation over its railway line in due course of business from Cumberland, Maryland, to points of delivery

115 West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff herein, residing and being in said Counties of West Virginia, for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia, to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually enjoined and commanded to accept



from the plaintiff as aforesaid, all such liquors presented to them by the plaintiff for shipment over its said line of railway from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its railway line in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and delivery of merchandise, and for the keeping of a record of the same, as required by the law of the State of West Virginia; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its railway line at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof.

Provided, however, that before the said defendant, The Western Maryland Railway Company, its servants, agents, employees and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties, in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things shall carefully scrutinize said shipments of liquor and exercise their common sense to prevent said railway and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia; and in case the defendant, its agents, servants, employees and officers, shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees and officers shall refuse to accept or deliver the same, as the case may be.

JOHN C. ROSE,  
*District Judge.*

117

*Perpetual Injunction.*

Issued December 24, 1914.

THE UNITED STATES OF AMERICA,  
*District of Maryland, To wit:*

The President of the United States of America to The Western Maryland Railway Company, a corporation:

Whereas, The James Clark Distilling Company, a corporation, duly organized and existing under the laws of the State of Maryland, and a citizen of said State and of the United States filed its Bill of Complaint against you, as defendant, in the District Court of the United States for the District of Maryland, at Cumberland, Maryland, on the 24th day of August, 1914, praying among other things for an injunction perpetually commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them to cease refusing to accept for transportation over its railway line in due course of business, from Cumberland, to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all liquors ordered by Floyd Rosier or other customers of The James Clark Distilling Company, for their own personal use, and without solicitation on the part of The James Clark Distilling Company, as more particularly set forth in said Bill of Complaint;

And whereas the said District Court hath, this 24th day of December, 1914, granted an injunction commanding and enjoining you as hereinafter set forth,

You, your agents, servants, employees and officers and each of them are therefore commanded and enjoined to cease refusing to accept for transportation over *its* railway line in due course  
118 of business from Cumberland, Maryland, to points of delivery in the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff aforesaid, residing and being in said Counties of West Virginia, for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually enjoined and commanded to accept from the plaintiff as aforesaid, all such liquors presented to them by the plaintiff for shipment over its said line of railway from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its railway in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and

delivery of merchandise and for the keeping of a record of the same, as required by the laws of the State of West Virginia; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its railway lie at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof, provided, however, that before the said defendant, The Western Maryland Railway Company, its servants, agents, employees and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties, in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors, whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things carefully scrutinize said shipments of liquor and exercise their common sense to prevent said railway and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia; and in case the defendant, its agents, servants, employees and officers, shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees and officers shall refuse to accept or deliver the same, as the case may be, under the pains and penalties that may fall thereon. Hereof fail not at your peril.

120 Witness the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, the 24th day of December, 1914.

Issued the 24th day of December, 1914.

[SEAL OF COURT.]

ARTHUR L. SPAMER,  
*Clerk of our Said District Court.*

*Marshal's Return Endorsed on Above Injunction.*

Served the within Perpetual Injunction on the Western Maryland Railway Company, by service on L. F. Timmerman, its Sect'y & Treas., by handing him an attested copy of the same, at Baltimore, Maryland, December 24, 1914.

GEORGE W. PADGETT,  
*U. S. Marshal.*

121

*Order of Court Directing a Re-argument.*

Filed January 15, 1915.

In the District Court of the United States for the District of  
Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, Md.,  
a Corporation,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

The Court of its own motion having come to the conclusion that there is probable error in the decree entered in the above entitled cause on the 24th day of December, 1914, hereby this 15th day of January, 1915, orders a re-argument of said matter to be held on Wednesday, January 20th, 1915, at 10 o'clock A. M., in the United States District Court Room, at Baltimore, Maryland.

JOHN C. ROSE,  
District Judge.

122

*Final Decree.*

Filed January 23, 1915.

District Court of the United States, District of Maryland, at  
Cumberland, Maryland.

No. 2, Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
Complainant.

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,  
Defendant.

*Decree.*

This cause came on to be heard in pursuance of the order for re-argument entered on January 15th, 1915, and all parties being present in open court by their counsel, counsel for complainant objected to the vacation and setting aside of the decree of December 24th, 1914, on the grounds that the constitution and laws of West Virginia as applied to the interstate commerce transactions disclosed in the pleadings and evidence are repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof; and that if the application of said constitution and law of West Virginia to such interstate commerce is authorized by the

Act of Congress of March 1st, 1913, entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," that said Act of Congress is repugnant to said Commerce Clause and the Fifth Amendment of the Constitution of the United States.

123 On consideration whereof it appearing to the Court that its decision and decree entered herein on December 24th, 1914, is in conflict with the decision of the United States Circuit Court of Appeals, for the Fourth Circuit, in the case of State of West Virginia, Appellant, vs. Adams Express Company, Appellee, No. 1325 in said Court, a copy of the opinion of the Court of Appeals being filed herewith, it is now ordered that said decree entered herein on December 24th, 1914, be and the same is hereby vacated and set aside. And thereupon this Court in conformity with the said decision of the United States Circuit Court of Appeals for the Fourth Circuit orders and decrees that the bill of complaint be and the same is hereby dismissed at the costs of the plaintiff. Thereupon came the plaintiff and presented its petition for an appeal from this decree to the Supreme Court of the United States, and its assignment of errors and said appeal is allowed in open court.

JOHN C. ROSE,  
*District Judge.*

124 Clerk's Office, U. S. Circuit Court of Appeals, Fourth Circuit.  
H. T. Melgney, Clerk, Richmond.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1325.

STATE OF WEST VIRGINIA, Appellant,  
versus  
ADAMS EXPRESS COMPANY, Association, Appellee.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston.

[Argued Dec. 9, 1914.]

Decided Jan. 13, 1915.]

Before Knapp and Woods, Circuit Judges, and Waddill, District Judge.

Fred O. Blue and Wayne B. Wheeler, for Appellant, and George E. Price and Joseph S. Grayon (Lawrence Maxwell on brief), for Appellee.

WOODS, *Circuit Judge*:

124a The State of West Virginia brought this suit in the Circuit Court of Kanawha County against the Adams Express Company, R. H. Clendenin and Edward Beigel alleging; that Biegel, a resident of Cincinnati, Ohio, sent through the mails

to many persons in West Virginia circular letters soliciting the purchase of intoxicating liquors, contrary to the law of the State; that Clendenin, induced by the solicitation, ordered from Beigel one-fourth of a barrel of beer which was carried by the Adams Express Company from Cincinnati to Charleston, West Virginia, and was there held by the carrier ready for delivery when the bill was filed; and that Beigel intends to continue to ship into West Virginia by the defendant Express Company beer on orders so solicited. The breach of duty to the State alleged against the Express Company was its failure to use due diligence to ascertain before carrying the beer whether the contract for its sale was made in pursuance of an illegal scheme of solicitation, and that by delivering the beer, as it intended, it would aid Beigel in his unlawful attempt to make sales in West Virginia, inasmuch as the statute makes the place of delivery the place of sale. Beigel was not served. The relief asked, with which we are now concerned, is that the State

"Be awarded an injunction against the said defendant, the Adams Express Company, restraining it, its agents, employees and representatives from delivering to the defendant R. H. Clendenin the consignment aforesaid of one-fourth barrel of draught beer; and that defendant, the Adams Express Company, its agents, employees and representatives, be enjoined from delivering to the defendant, or to any other person, any shipment of liquors manufactured by the Pabst Brewing Company and handled by said defendant Beigel, or any of his agents, representatives, or employees at any place where said defendant Express Company operates in the State of West Virginia, within the jurisdiction of the court, unless the consignee of any such liquors can show to the satisfaction of the defendant

Express Company, its agents, representatives and employees,  
124b that he without solicitation from said Beigel, or any of his agents, representatives, or employees ordered the consignment of liquors for his own personal lawful use without having received from said Beigel, or any of his agents, representatives or employees, advertisements or letters soliciting orders for liquors, or price lists or order blanks advertising or soliciting from the consignee orders for liquors."

A preliminary order of injunction was made by the State Court, but upon removal of the cause to the District Court for the Southern District the District Judge, on motion of the Adams Express Company, dissolved the injunction and dismissed the bill, holding that the State law could not prevent solicitation through the United States mails for the sale of liquor, and that there is nothing in the Wilson Act or the Webb-Kenyon Act which authorizes the State to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed dealer without the State.

The appeal requires a consideration of the scope and effect of the West Virginia Constitutional and Statute Law and the effect upon it of the Act of Congress of 1 March, 1913, known as the Webb-Kenyon Act.

1. In trying to comprehend the legislative purpose in prohibition



statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not

124c only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

We are not concerned in this case with the question whether the State Legislature or the State Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another State and bring them into the State of West Virginia for his own consumption; but with the very different question whether the State may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the State by the common carrier of liquor so to be delivered contrary to the law of the State. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the State and deliveries by common carriers, by which liquor dealers outside of prohibition States were enabled to thwart the efforts of State governments to save the people of the State from the liquor evil, have been forbidden by State legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the Act of Congress known as the Webb-Kenyon Act.

The amendment to the Constitution of the State of West Virginia, known as section 46, ratified in November, 1912, prohibits "the manufacture, sale and keeping for sale" of intoxicating liquors, with exceptions not material here; and it provides that "the Legislature shall, without delay enact such laws, with regulations, conditions,

124d securities and penalties as may be necessary to carry into effect the provisions of this section." On 11 February, 1913, the Legislature enacted a statute to take effect 1 July, 1914, which in section three contained this provision:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer, or expose for sale; or solicit or receive orders for any liquors or absinthe or any liquors compounded with absinthe, he shall be deemed guilty of a misdemeanor; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale, said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment

or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

2. At the argument it seemed to be conceded that State legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the State legislative power. The power of the State to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in *Sinnot vs. Davenport*, 63 U. S. 227. *Delamater vs. South Dakota*, 205 U. S. 93, and innumerable other federal and State decisions. "The internal commerce of a State—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government." *Sands vs. Manistee River Improvement Company*, 123 U. S. 288; *Hart vs. State*, 87 Miss. 171, 39 So. 124e 523, 112 Am. St. 437. This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in *State vs. Herring*, 145 N. C., 418, 58 S. E. 1007, 122 Amer. St. 461, and *State vs. Patterson*, 134 N. C. 612, 47 S. E. 808.

3. There is nothing in the amendment of the State Constitution that takes away by implication this power of the legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits "the manufacture, sale and keeping for sale" of liquors. But it does not indicate a purpose to deprive the legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the State on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the State as a permanent State policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the constitution as the permanent law of the State. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in *State vs. Hooker* (Okl.), 98 Pac. 964.

4. The point is earnestly pressed that even if it be true 124f that under the statute in West Virginia delivery in any county of the State is a sale in that county, yet under an exception of the statute, the express company has the right to promote

illicit sales by daily carrying liquor to be delivered in the State in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person "who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing, or exposing for sale as the case may be" and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the State that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who either from carelessness or design habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that habitual aid extended to others violating the law shall not be subject to injunction as a nuisance. If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in *In Re Debs*, 158 U. S. 564, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration, is thus stated in the case cited:

"Every government, entrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing to one resulting in injury to the general welfare is often of itself sufficient to give it standing in court."

5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor.

6. The right of the State to an injunction against the persistent transportation by the express company of liquor to be delivered in

West Virginia, in pursuance of a contract of sale made in another State, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for 124*h* Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

7. It makes no difference that the United States Mail was used for the solicitation. The Federal Government does not protect those who use its mails to thwart the police regulations of a State made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses, *In Re Polliser*, 136 U. S. 257; *U. S. vs. Shayer*, 209 U. S. 39; *Hayner vs. State*, 83 Ohio 178; *State vs. Morrow*, 40 S. C. 221, 18 S. E. 853.

8. The express company further contends that the State is not entitled to an injunction against the delivery in West Virginia of the liquor which it has transported for Beigel, or against its intended transportation and delivery of liquor which Beigel intends to consign to other persons in West Virginia, on the assertion that these transactions are under Federal protection as interstate commerce and beyond the reach of the legislature of the State. This proposition is admitted to be sound, unless the Webb-Kenyon Act removes the protection and subjects the delivery of liquor in West Virginia to the inhibition of the State legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia.

9. The position is untenable that the Webb-Kenyon Act 124*i* has no application, and therefore is without efficacy to extend the scope of the State legislation to interstate dealings in liquor because that statute was not enacted until 1 March, 1913, after the West Virginia statute had been passed on 11 February, 1913. The point has not been decided by the Supreme Court of West Virginia. There is a dictum in *State vs. Miller*, 66 West Virginia 436, in favor of the position of the express company, where the question was the application of the Wilson Act to West Virginia legislation. But as the court expressly stated the point was not and could not be involved since the State statute under consideration had been reenacted after the passage of the Wilson Act. But even if this had been a direct decision we do not think it could prevail against the contrary view of the Supreme Court of the United States, for we venture to think the question is not one of the construction of a State statute, but of the force and effect of a Federal statute in a State law and on such an issue the decisions of the Supreme Court of the United States are controlling. That court thus determined

the matter in *In Re Rahrer*, 140 U. S. 545; in passing on the effect of the Wilson Bill:

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

This principal has been reaffirmed in *Butler vs. Gorely*, 146 U. S. 303, *Ernest vs. Missouri*, 156 U. S. 296; *Central P. C. R. Co. vs. Nevada*, 162 U. S. 512; *Silt vs. Westerberg*, 211 U. S. 31.

This is the Webb-Kenyon Statute including the title:

124j An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spiritous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

10. The terms of the statute are so plain and unambiguous that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the State law only after arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee "imported liquor fell within the category of domestic articles of a similar nature." In *Re Rahrer*, *Supra*.

The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one State were protected in impairing or defeating the efforts of another State to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one State into another not only when it is intended to be sold in violation of any law of such

State, but when it is to be received or possessed or in any manner used in violation of the State law. This is a direct recognition of the right of the State to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor that "the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier



to the consignee," and it expressly forbids a sale within the State. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of State prohibition laws which it was the manifest intention of the Congress to remove. The Supreme Court of Kentucky has held that although the State expressly prohibits the delivery of liquor by a common carrier and such prohibition is valid as to all intrastate shipments, yet the Webb-Kenyon Act does not permit such prohibition to extend to intrastate commerce where the liquor is for personal use. *Adams Express Company vs. Commonwealth*, 154 Ky. 426, 157 S. W. 908, 47 L. R. A. (N. S.) 342.

11. All other decisions we think are in complete accord with the conclusion we have reached, namely that the Webb-Kenyon Act puts without the protection of interstate commerce liquor shipped into the State to be sold, received, or used, when sale, receipt or use is forbidden by the State law. *Palmer vs. Express Co.*, 124/ (Tenn.) 165 S. W. 236; *State vs. Doe* (Kansas), 139 Pac. 1169; *State vs. Express Co.* (Ind.), 145 N. W. 451; *United States vs. Oregon-Washington R. & N. Co.*, 210 Fed. 378; *Van Winkle vs. State*, (Del.) 91 Atl. 385; *Ex Parte Peece*, (Texas) 170 S. W. 749; *Southern Express Company vs. State* (Ala.), 66 So. 115; *Amer. Express Co. vs. Beer* (Miss.), 65 So. 575. The general trend of Congressional debate on the bill attributed the same meaning to the act, as did also the opinion of the Attorney General given to the President on the question of its constitutionality. Since delivery by one party is necessary to the receipt by another, if receipt be forbidden by a statute, deliveries might well be enjoined as acts promoting illegal receiving of liquor. Under the West Virginia Statute they are the subject of injunction as sales within the State.

12. The constitutionality of the Webb-Kenyon Statute is attacked on the ground that it is an attempt by Congress to confer on State Legislatures the power to regulate interstate commerce. This we think is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex Parte Rahrer*, *Supra*; *Lottery Case*, 188 U. S. 321; *Hoke vs. U. S.*, 227 U. S. 308; *Hipolite Egg Co. vs. United States*, 220 U. S. 45. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

13. The following language of Mr. Justice White in *Vance vs*



124m Vandercook, 170 U. S. 438, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a prohibition State.

"On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the law-making or the executive power of the State; it takes its origin outside of the State of South Carolina and finds its support in the Constitution of the United States."

It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the States, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular States when such transportation would be especially injurious to the public interest in that, when they reach the State, they will derange and make inefficacious the police measures for the control of intoxicants which the State has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the States of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.

We think that the State of West Virginia is entitled to the order of injunction prayed for and it will be so ordered.

Reversed.

125 *Petition for Appeal and Assignment of Errors.*

Filed January 23, 1915.

District Court of the United States, District of Maryland.

No. 2. Equity Docket. At Cumberland, Maryland.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
Complainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,  
Defendant.

## Petition for Appeal and Assignment of Errors.

Complainant prays an appeal from the decree entered herein on January 23, 1915, to the Supreme Court of the United States and assigns as error that this court erred;

1. In holding that the constitution and laws of West Virginia make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by the shipper to the consignee in such other state.

2. In holding that the constitution and laws of West Virginia prohibit a liquor dealer in a state other than West Virginia from advertising the sale of liquors in such other state to be transported and delivered in pursuance of such sale to the persons to whom such advertisements may come for their personal use; such advertising being carried or by means of the United States mail.

126 3. In holding that the constitution and laws of West Virginia, if they make the place of delivery in West Virginia the place of sale, where a shipment of intoxicating liquors is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by mail at the point of origin of said shipment in said other state, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

4. In holding that the constitution and laws of West Virginia, if they prohibit a dealer in a state other than West Virginia from advertising the sale of liquors in said other state to be transported and delivered to the persons to whom such advertisements may come for their personal use; such advertisements being carried on by means of the United States mail, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

5. In holding that the Act of Congress of March 1, 1913 entitled: "An Act divesting intoxicating liquors of their interstate character

in certain cases," authorized the state of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for personal use of the consignee in West Virginia.

6. In holding that the Act of Congress of March 1 1913, entitled; "An Act divesting intoxicating liquors of their interstate character in certain cases," if it authorized the State of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for the personal use of the consignees in West Virginia is not repugnant to the Commerce Clause of the Constitution of the United States and the 5th Amendment thereof.

127 7. In vacating its decree entered December 24, 1914.

8. In court dismissing the bill of complaint.

LAWRENCE MAXWELL,

WALTER C. CAPPER,

*Solicitors for Plaintiff.*

128 *Order of Court Prescribing Bond to be Given on Appeal.*

Filed January 23, 1915.

In the District Court of the United States for the District of Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,  
a Corporation,

vs.

WESTERN MARYLAND RAILWAY COMPANY, a Corporation, and  
The State of West Virginia, a Body Politic and a Sovereign State.

Ordered, by the District Court of the United States for the District of Maryland, this 23rd day of January, 1915, that The James Clark Distilling Company, a corporation, plaintiff in the above entitled cause, give an appeal bond in the penalty of Two Hundred Dollars (\$200.00) for costs on its appeal to the Supreme Court of the United States, from the decree entered this day in said cause.

JOHN C. ROSE,

*U. S. District Judge.*

129

*Appeal Bond.*

Filed January 26, 1915.

Know all men by these presents, That we, The James Clark Distilling Company of Cumberland, Md., as principal, and William A. Buchholtz of Cumberland, Md., as surety, are held and firmly bound unto The Western Maryland Railway Company and the State of West Virginia, in the full and just sum of Two hundred dollars to

be paid to the said The Western Maryland Railway Company and the State of West Virginia, their certain attorney, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of January, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a District Court of the United States for the District of Maryland, in a suit depending in said Court, between The James Clark Distilling Company of Cumberland, Md., a corporation, plaintiff, and The Western Maryland Railway Company and the State of West Virginia, defendants, a decree was rendered against the said The James Clark Distilling Company of Cumberland, Md., and the said The James Clark Distilling Company of Cumberland, Md., having been allowed an appeal from said decree to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said The Western Maryland Railway Company and the State of West Virginia, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

130 Now, the condition of the above obligation is such, That if the said The James Clark Distilling Company of Cumberland, Md., shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,  
By JNO. KEATING, *Its Vice President.*

[Seal of Co.]

WILLIAM C. BUCHHOLTZ.

[SEAL.]

Sealed and deliver- in presence of—

JNO. KEATING, *Secretary.*

WALTER C. CAPPER.

Approved by—

JOHN C. ROSE,

*U. S. District Judge for the District of Maryland.*

131 UNITED STATES OF AMERICA, ss:

To the Western Maryland Railway Company and the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland, entered on the 23rd day of January, 1915, in a cause pending therein wherein The James Clark Distilling Company, a corporation, is plaintiff, and you are defendants, to show cause, if any there be, why

the decree rendered against the said plaintiff as in the said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the said District Court of the United States, this twenty-third day of January, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Maryland.]

JOHN C. ROSE,  
*Judge of the District Court of the United  
States for the District of Maryland.*

Attest:

ARTHUR L. SPAMER,  
*Clerk District Court of the United States  
for the District of Maryland.*

Service of the within Citation acknowledged this 28th day of January 1915.

THE STATE OF WEST VIRGINIA,  
By FRED. O. BLUE, *Its Attorney.*  
THE WESTERN MARYLAND RAILWAY  
CO.,  
By BENJ. A. RICHMOND, *Its Attorney.*

132 *Plaintiff's Præcipe for Record on Appeal.*

Filed February 11th, 1915.

District Court of the United States, District of Maryland, at  
Cumberland, Maryland.

No. 2, Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
Complainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,  
Defendant.

*Præcipe.*

To the Clerk:—

Please incorporate into the transcript on appeal, the following portions of the record:

1. Bill of Complaint.
2. Plaintiff's Exhibit No. 1.
3. Answer of Western Maryland Railway Company.
4. Defendant's Exhibits Nos. 1 and 2.
5. Plaintiff's Exhibits Nos. 1, 2, 3, 4, and 5.
6. Petition of State of West Virginia to be made a party to this cause and Order of Court thereon permitting the State of West Vir-

ginia to be made a party unless cause to the contrary be shown as therein set forth.

7. Exhibits Nos. 1 and 2 of the State of West Virginia.

8. Order of Court making the State of West Virginia a party defendant.

9. Condensed Statement of Testimony as prepared by Appellants and agreed to by appellees and approved by the Court.

10. Opinion of the Court.

133 11. Decree.

12. Injunction.

13. Order of Court ordering a re-argument of this case.

14. Decree dismissing bill of complaint.

14½. Certified copy of the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in State of West Virginia, Appellant, vs. Adams Express Company, Appellee, No. 1325.

15. Petition for appeal.

16. Assignment of Errors.

17. Order of Court prescribing amount of bond to be given on appeal.

18. Appeal bond.

19. Citation.

20. Order to transmit Record.

21. Clerk's Certificate.

LAWRENCE MAXWELL,  
WALTER C. CAPPER,

*Attorneys for Plaintiff.*

Service of a copy of the foregoing præcipe acknowledged this 8th day of February, 1915.

FRED. O. BLUE,

*Counsel for the State of West Virginia.*

Service of a copy of the foregoing præcipe acknowledged this 10th day of February, 1915.

BENJ. A. RICHMOND,

*Counsel for Defendant The Western  
Maryland Railway Co.*

Service of a copy of the foregoing præcipe acknowledged this 11th day of February, 1915.

JOHN PHILIP HILL,

*Counsel for Defendant The Amer-  
ican Express Company.*

134

*Order to Transmit Record.*

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, *Clerk.*



*Clerk's Certificate.*

UNITED STATES OF AMERICA,

*District of Maryland, To wit:*

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 25th day of February, 1915.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

135 In the District Court of the United States for the District of Maryland.

No. —. Equity.

JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD., a Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

To the Honorable John C. Rose, Judge of said Court:

The petition of the James Clark Distilling Company in the above entitled cause, respectfully shows:

That this Honorable Court passed a final decree in the above cause on the 23d day of January, 1915, and the plaintiff was allowed an appeal from said decree to the Supreme Court of the United States, provided the record was made up and filed in the Supreme Court of the United States within thirty days from said 23d day of January, 1914.

Your petitioner now says that ever since said 23d day of January, 1915, its attorneys have been constantly engaged in having its appeal in this case perfected, but that on account of the fact that counsel engaged in said case reside a great distance apart, your petitioner's attorneys have been delayed in effecting an agreement among said attorneys as to what should constitute the record, and as to the narrative form to which the testimony should be reduced; that all of said matters have now been agreed upon by counsel, and the Clerk of this Court is engaged in perfecting the transcript in said case, but your petitioner is informed that said Clerk may be unable to have the transcript perfected in time to have the same filed in the Supreme Court of the United States on or before the return day, to-wit the 23d day of February, 1915, and your petitioner therefore respectfully prays the Court to pass an order hereon, extending the

136 time for making up the said record and filing the same with the Clerk of the Supreme Court of the United States, for a period of twenty days from the said 23d day of February, 1915.

And as in duty bound, &c.

LAWRENCE MAXWELL,  
WALTER C. CAPPER,

*Attorneys for the James Clark Distilling Company.*

Upon the foregoing petition it is ordered this 18 day of February, 1915, by the District Court of the United States, for the District of Maryland, that the time allowed the plaintiff in the foregoing cause for having the record of said case made up and filed with the Clerk of the Supreme Court of the United States, be and the same is hereby extended for a period of twenty days, from the 23d day of February, 1915.

JOHN C. ROSE,  
*District Judge.*

137 [Endorsed:] No. 2. Equity. In the District Court of the United States for the District of Maryland. The James Clark Distilling Company, of Cumberland, Md., a Corporation, vs. The Western Maryland Railway Company. Petition and Order of Court. Mr. Clerk: Enter this Order on the minutes at Cumberland. John C. Rose, Judge. Walter C. Capper, Attorney and Counselor at Law, 10 Water Street, Cumberland, Md. Filed 18 February, 1915.

138 Supreme Court of the United States.

No. —.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MARYLAND, a Corporation, Appellant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY and THE STATE OF WEST VIRGINIA, Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

*Stipulation for Reducing the Printed Record.*

It is hereby stipulated that in printing the record on appeal, the Clerk may omit pages 59 to 75 inclusive of the typewritten record, being Petitioner's Exhibit No. 1, bill of complaint in State of West Virginia vs. Western Maryland Railway Company in the Circuit Court of Tucker County, West Virginia; and pages 76 to 79 inclusive of the typewritten record being Petitioner's Exhibit No. 2, the injunction order of the Circuit Court of Tucker County in said case, said two exhibits being duplications of Respondent's Exhibits Nos.

1 and 2 respectively. The Clerk shall also omit in printing the record pages 17 and 18, being duplicates of the railroad bill of lading shown on page 16.

LAWRENCE MAXWELL,  
*Attorney for Appellant.*

BENJ. A. RICHMOND,  
*Attorney for Western Maryland Railway Company, Appellee.*

FRED. O. BLUE,  
*Attorney for State of West Virginia, Appellee.*

139 [Endorsed:] 857/24601. Supreme Court of the United States. The James Clark Distilling Company, of Cumberland, Maryland, a Corporation, Appellant, vs. The Western Maryland Railway Company and the State of West Virginia, Appellees. Stipulation for Reducing the Printed Record. Maxwell & Ramsey, Cincinnati, Ohio.

140 [Endorsed:] File No. 24,601. Supreme Court U. S., October term, 1914. Term No. 857. The James Clark Distilling Co., Appellant, vs. The Western Maryland Railway Company et al. Stipulation to omit parts of record in printing. Filed March 15, 1915.

Endorsed on cover: File No. 24,601. Maryland D. C. U. S. Term No. 857. The James Clark Distilling Company, appellant, vs. The Western Maryland Railway Company and The State of West Virginia. Filed March 5th, 1915. File No. 24,601.

(24,602)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 858.

THE JAMES CLARK DISTILLING COMPANY, APPELLANT,

*vs.*

THE AMERICAN EXPRESS COMPANY AND THE STATE OF  
WEST VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print
Caption .....	1	1
Bill of complaint.....	2	1
Answer of the American Express Co.....	14	8
Defendant's Exhibit 1—Order granting injunction of circuit court of Tucker county, West Virginia.....	16	9
Petition of State of West Virginia to be made a party defend- ant .....	20	12
Order granting leave to file petition.....	25	14
Petitioner's Exhibit 1—Bill of complaint before circuit court of Tucker county, West Virginia, in case of State <i>vs.</i> American Express Co. ....	26	15
Petitioner's Exhibit 2—Order granting injunction of circuit court of Tucker county, West Virginia (omitted in printing) ..	41	
Order making State of West Virginia a party defendant.....	45	24
Testimony of George J. Gocke.....	46	25
John Keating .....	50	27
Stanton Ennes .....	58	31
Walter A. Yingling.....	61	33

	Original. Print	
Certificates of counsel to testimony.....	63	34
Certificates of judge to testimony.....	63	34
Opinion (Rose, J.) .....	64	34
Opinion (Rose, J.) in case of James Clark Distilling Co. <i>vs.</i> Western Maryland Railway Co.....	65	35
Decree .....	74	40
Perpetual injunction .....	77	42
Order directing reargument.....	81	44
Final decree .....	82	44
Opinion of circuit court of appeals (Woods, J.) in case of West Virginia <i>vs.</i> Adams Express Co.....	84	45
Petition for appeal and assignment of errors.....	85	54
Order fixing bond on appeal.....	88	55
Appeal bond .....	89	55
Citation and service.....	91	56
Præcipe for record.....	92	57
Order to transmit record.....	94	58
Clerk's certificate .....	94	59
Petition for extension of time, etc.....	95	59
Order extending time for filing, etc.....	96	60
Stipulation to omit parts of record in printing.....	98	60

1 UNITED STATES OF AMERICA,  
*District of Maryland, To wit:*

At a District Court of the United States in and for the District of Maryland, Begun and Held at the City of Cumberland on the Last Monday in September (Being the Twenty-eighth Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

**Present:**

The Honorable John C. Rose, Judge Maryland District.  
John Philip Hill, Esq., Attorney.  
George W. Padgett, Esq., Marshal.  
Arthur L. Spamer, Esq., Clerk.  
William J. Feaga, Deputy Clerk.

Among other were the following proceedings, to wit.

**In Equity.**

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MARY-  
LAND, a Corporation,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed  
under the Laws of the State of New York.

2 *Bill of Complaint.*

Filed August 24, 1914.

In the District Court of the United States in and for the District of the State of Maryland, at Cumberland, Maryland.

**In Equity.**

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-  
plainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed  
under the Laws of the State of New York, Defendant.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, Sitting at Cumberland, Maryland:

The bill of complaint of The James Clark Distilling Company, of Cumberland, Maryland, a corporation and citizen of the State of



Maryland, against the American Express Company, a joint stock association formed under the laws of the State of New York, and a citizen and resident of the State of New York, respectfully shows and complains to your Honor as follows:

1. That your orator is a corporation legally incorporated, organized and existing under the laws of the State of Maryland, and as such, is a citizen of and an inhabitant of said State, residing therein and doing business in the City of Cumberland, in said State, and as such corporation, it is now and for a long time past, has been engaged in the business of manufacturing, selling and dealing in spirit-ous and fermented liquors, and for many years last past has been doing a large and profitable business by the sale of such liquors and merchandise to persons residing in the States of West Virginia, Ohio, Pennsylvania, and elsewhere.

2. That the defendant, American Express Company, is a common carrier and a joint stock association formed under the laws of the State of New York, and is a citizen and resident of said State of New York, and for several years last past has been and is now a common carrier engaged in the transportation and delivery of packages of goods, wares and merchandise, over the line of The Western Maryland Railway Company, a corporation, from the City of Baltimore, Maryland, westerly through the States of Maryland, Pennsylvania and West Virginia, and into *the* through the City of Cumberland, in Maryland, and from thence into and through the Counties of Mineral, Grant and Tucker, in said State of West Virginia, and for some years past has been and is still now operating as such common carrier through said States, and is, therefore, an Express Company engaged as such common carrier in interstate transportation of goods, wares and merchandise between and through said States, and as such common carrier, between the States of Maryland and West Virginia, is engaged in interstate commerce, and as such, is one of the Express Companies subject to the Act of Congress to regulate commerce under the Interstate Commerce Clause of the Constitution of the United States, approved February 4th, 1887, and all amendments thereto passed by Acts of Congress since said date, and especially the Act of Congress approved June 18th, 1910, commonly called the Act to Regulate Commerce.

3. Your orator further charges that said American Express Company, is operating as a common carrier aforesaid through the States of Maryland and West Virginia under an agreement with The Western Maryland Railway Company, a railroad corporation and common carrier, owning a line of railroad and engaging in interstate commerce between the aforesaid States, and that said defendant, under its aforesaid agreement is equipped with all necessary cars and other vehicles and instrumentalities and facilities for the shipment or carriage of goods, wares and merchandise, and the handling of such property transported by it from Cumberland, Maryland, to said Counties of Mineral, Grant and Tucker, in West Virginia, and runs and operates from Cumberland, Maryland, through said Counties of West Virginia, daily express trains so equipped for such transportation, and has and maintains stations

and platforms at various points in Mineral, Grant and Tucker Counties, West Virginia, at and from which to deliver goods, wares and merchandise so transported from Cumberland to said places, and has a station for such delivery of such merchandise so transported in the town of Parsons, in Tucker County, West Virginia, in constant charge of regular Agents, and has at the City of Cumberland, Maryland, an office and station in charge of competent employees and agents, for the receipt and acceptance of all lawful goods, wares and merchandise tendered said company for transportation, to all said points in the State of West Virginia, and that by reason of all the foregoing, it is the legal duty of said Express Company, as such common carrier in interstate business, to accept for transportation over its said lines, all lawful goods, wares and merchandise delivered to its office or station at Cumberland, Maryland, for transportation

by it, from Cumberland through said States of Maryland and  
5 West Virginia to said points of delivery in said Counties of West Virginia, and that by said Act of Congress, commonly called the Act to Regulate Commerce, and by said amendments thereof, it was made the duty of said defendant company to provide and furnish such transportation for such goods, wares and merchandise so tendered to it for transportation upon reasonable request therefor.

4. Your orator further says that by the aforesaid Act of Congress, and the amendments thereof, it was made unlawful for any common carrier, subject to the provisions of the same, to make or give any undue or unreasonable preference or advantage to any particular person, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and that for the reasons aforesaid, all the provisions of said Act are applicable to and binding upon said defendant express company in respect to all transportation of goods, wares and merchandise from Cumberland, in Maryland, to said Counties in West Virginia.

5. Your orator further charges that in the due and regular course of its business, it did on the morning of the 20th day of August, 1914, receive at Cumberland, Maryland by mail a written order from one Floyd Rosier, a citizen and resident of the town of Parsons, in Tucker County, West Virginia, to ship to him at Parsons, West Virginia, by the first train from Cumberland, Maryland, four quarts of alcohol of 1.88 proof, by express, which order to ship said liquor was accompanied by a money order for Four Dollars (\$4.00) to pay your orator for the same, and your orator now says that said order was a bona fide order in every respect, and was sent to your orator

without any solicitation on the part of any person inducing

6 the said Rosier to send the same, and that said order stated on its face that it was for the personal use of the said Rosier, and your orator now charges that it has every reason to believe, and does believe, that said order came to it in a perfectly lawful manner, and that said liquor was intended for the personal use of the said Rosier, and that your orator has no reason whatever of any kind to

suspect that order for said liquor was given or intended to in any way violate the Laws of the State of West Virginia.

6. Your orator further charges that on said 20th day of August, 1914, it thereupon prepared said one gallon of alcohol of the proof named in said order for shipment to said Rosier, and presented the same for transportation to the defendant, which is the only express company shipping goods from Cumberland to Parsons by the aforesaid Western Maryland Railway, and that the agents and officials of said defendant in Cumberland, Maryland, refused to accept or transport the same, although your orator tendered to pay or satisfy to it all express charges for the delivery of said shipment at said town of Parsons to said Rosier, but that all of the agents and servants of the defendant refused to accept the same or to ship the same over its line to said town of Parsons, giving as a reason therefor that said express company had been enjoined by an order of the Circuit Court of Tucker County, State of West Virginia, from receiving, transporting or delivering any fermented or intoxicated liquors at or in said three Counties of said State, except on conditions set out in said injunction so burdensome in said business and traffic and interstate transportation of said liquors as made it impossible for said express company to comply with the same, said agents and other employees giving no other reason for their refusal to accept and ship said merchandise, whereupon your orator now charges that said defendant company has absolutely refused to accept said shipment of alcohol from Cumberland to Parsons to said Rosier, and refused to transport the same and still does so refuse, whereby your orator has been unable to make said sale of said alcohol to said Rosier, and has been and still is unable to ship the same to him, and has lost the profit upon said sale and has been thus prevented from doing said business in interstate commerce, which it was entitled to do, which said original written order of said Floyd Rosier and the money order he sent to pay for said liquor accompanying the same, and the triplicate bill of lading made out by your orator for the signature of the agent of the defendant in the usual course of business for the shipment of the said goods, and which said agent refused to sign, all in one exhibit, were filed by your orator in a case heretofore instituted in this Court against the Western Maryland Railway Company, which said exhibit your orator prays shall be made a part of this bill of complaint.

7. Your orator further shows that by an Act of the Legislature of West Virginia, passed February 11th, 1913, effective on the 1st day of July, 1914, the manufacture and sale, or keeping for sale, in the State of West Virginia, of malt, vinous or spirituous liquors, wine, porter, ale, beer, or any intoxicating drink, mixture or preparation of like nature, (except certain articles not pertinent to the issue in this case), were prohibited, and by said Act of the Legislature it was provided that the words liquors used therein should be construed to embrace all spirituous liquors or any other intoxicating drinks, mixture or preparation of like nature, and all malt or brewed drinks, whether intoxicating or not, and all liquids, mixtures or preparations, whether patented or not, which will produce intoxicating, and all beverages containing as much as one-half of one per cent.

8

of alcohol by volume, and your orator now admits that said four quarts of alcohol, ordered by said Rosier, was one of the kind of liquors mentioned and covered by said Act of — Legislature of West Virginia, but your orator, now charges that said Act did not prohibit the sale by non-residents of the State of West Virginia to persons residing in West Virginia, of any of said liquors, where said liquors were purchased upon orders not solicited by the seller, and were desired for the consignee's own personal use, and that, therefore, the order of said Rosier was a perfectly lawful order for the reasons aforesaid, under the Laws of West Virginia, and that the transportation of such goods so purchased by the defendant express company was in no wise prohibited by said law, and your orator is now advised that the injunction granted by the said Circuit Court of Tucker County aforesaid, and served upon the defendant company, was no legal or valid excuse for its refusal to accept and ship in interstate transportation said alcohol so offered to it for shipment, unless it be true that the requirements and restrictions set out in said injunction upon the defendant company, were in fact so burdensome to the said interstate business of said company, that it could not comply with the same, which your orator does not admit, but claims that said reason given by the defendant for not making said shipment for your orator, presents no valid grounds for the aforesaid denial of your orator's rights in the premises.

8. Your orator further charges that it owns and has on hand for sale and disposition, within the State of Maryland, a large and valuable quantity of various liquors of all kinds, covered by

9 the description in said Act of the Legislature of West Virginia, and that prior to the service of said injunction upon said defendant, your orator was doing a lucrative business in shipping such liquors to persons residing in West Virginia, upon their own personal, unsolicited orders, for their own personal use, all of which sales and shipments your orator is advised were in no wise contrary to the laws of West Virginia or any federal law; but that in the manner aforesaid, your orator has been prevented and is still prevented from making any more of said shipments over the line of the defendant to points in said three Counties in West Virginia, and that a large part of its aforesaid business, since the first day of July, 1914, was lawfully done upon orders from said three Counties, but that it is now informed by said defendant that it, under the mandate and restrictions of said injunction, will hereafter, accept none of said liquors for transportation to your orator's said customers in said three counties in West Virginia upon their said orders, and that there is no other Express Company, or other practicable means of transportation by which your orator can serve its said customers in and through said three Counties in West Virginia, except by the express facilities of the defendant, and that your orator has, therefore, no other means of serving its said customers, except by interstate transportation over said express line, by reason of all of which your orator, unless the defendant is restrained by the order and injunction of this Honorable Court, will be wholly deprived of any and all such legitimate business which it otherwise could do with its said customers, in said three

Counties in West Virginia, upon their orders as aforesaid, and its said business to that extent will be wholly destroyed and your orator will thereby lose a very large and profitable business and a large amount of profit much exceeding in value the sum of Three Thousand Dollars (\$3,000.00), and that the matters in dispute as aforesaid exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

9. Your orator therefore charges that the defendant has violated and is continuing from day to day to violate its duty as such interstate carrier, to provide and furnish transportation upon the reasonable request of your orator, of its said lawful goods, wares and merchandise, which it desires to ship to its customers in said three Counties in West Virginia, and is, therefore, acting in defiance of its duty as set out in Section 1 of said Act of Congress, commonly known as the Act to Regulate Commerce, and the amendments thereof, and that the defendant has already violated and is continuing from day to day to violate the provisions of Section 3 of said Act, by subjecting your orator and its aforesaid business and traffic in said liquors to an undue and unreasonable prejudice and disadvantage, and by its said conduct, has destroyed the aforesaid lawful interstate traffic and business of your orator, with its said customers in said three Counties of the State of West Virginia, and is, therefore, obnoxious to the condemnation of the provisions of said Section 3 of said Act, and by reason of the same, your orator is entitled to all the rights and remedies by a complaint or suit in this Court against the defendant for the prevention and redress of said wrong provided or allowed by and under any and all laws of the United States.

10. Your orator further charges that if the defendant persists in its determination to refuse to accept for shipment said traffic of your orator, its violation of said Act of Congress and of its duty thereunder, will be of daily occurrence, for each of which violations, your orator, under said Act, would be entitled to an action at law, in each of which actions it could recover a small amount of damages, but that such suits at law would afford your orator no full, complete and adequate remedy against the defendant on account of the vast multiplicity of suits, which would be necessary on its part to obtain reparation for each and every one of said particular causes of damage, and that suits at law would not only furnish your orator no adequate remedies at law, but that unless it is speedily adjudged by a court of competent jurisdiction, in matters of interstate commerce, that your orator has the right to make such shipments of goods, and that said defendant shall be compelled by the mandate of this Court to accept and transport the same to your orator's customers, in the State of West Virginia, will entirely cease to send in any such orders, and your orator will thereby lose all its aforesaid business permanently, and its loss will thus be irreparable, and your orator is therefore, advised that its only complete and adequate remedy under the law and facts in this case, is by an application to this Honorable Court for the passage of a decree in the nature of a mandatory order or injunction against the defendant, commanding and requiring it to cease refusing to accept and transport over its

express line, from Cumberland, Maryland, to points in said three Counties in West Virginia, your orator's merchandise as aforesaid, and commanding and requiring said defendant to accept the same for transportation, and to transport the same in interstate commerce, from Cumberland, Maryland, and to deliver the same, by means of its express line, to such points in said three counties in West Virginia, to which said goods shall be consigned by your orator, where the defendant maintains a permanent office with a regular agent for receiving and delivering goods, and keeping a record of the same as required by the Law of the State of West Virginia.

12 11. To the end, therefore, that the defendant, American Express Company, may answer the premises and that a decree of this Honorable Court may be passed strictly commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them, to cease refusing to accept for transportation over its express line, in due course of business, from Cumberland, to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all such aforesaid liquors ordered by the said Floyd Rosier or other customers of your orator, for their own personal use, and without solicitation on the part of your orator, and enjoining and commanding the defendant, its servants, agents, employees and officers to accept from your orator all such merchandise as aforesaid, presented to it for shipment over its line to said points in West Virginia, and enjoining and commanding the defendant, its servants, agents, employees and officers to transport the same in interstate commerce, from Cumberland, in the State of Maryland, to all such points on its express line in said three Counties in West Virginia, where the defendant maintains a permanent office or station with a regular agent for receiving and delivering such goods, and for the keeping of a record of the same as required by the Law of West Virginia, and perpetually requiring and commanding the defendant, its agents, and servants to deliver all such liquors, presented for shipment by your orator, over its line at said points in said three Counties in West Virginia, to the consignees thereof upon such aforesaid orders of your orator's customers, and that your orator may have such other and further relief as its case may require.

13 May it please your Honor to pass an order hereon, to be served by the United States Marshal for the District of Maryland, upon the defendant herein, commanding and requiring it to be and appear in this Court, at Cumberland, Maryland, on some certain day to be fixed by the order of this Court, to thereupon answer the premises and show cause, if any it has, why such decree should not be passed as prayed.

And as in duty bound, etc.,

WALTER C. CAPPER,  
J. PHILIP ROMAN,  
*Solicitors for Complainant.*

STATE OF MARYLAND,  
*Allegany County, To wit:*

I hereby certify that on this 22nd day of August, 1914, before me, the subscriber, a Notary Public, in and for the State and County



aforesaid, personally appeared John Keating, Vice President and Treasurer of The James Clark Distilling Company of Cumberland, Maryland, the complainant in the above case, and made oath in due form of law that he is such Vice President and Treasurer of said Company, and familiar with its business and affairs, and is fully acquainted with the matters and things set out in the foregoing bill of complaint, and that the matters and things therein stated and set forth are true to the best of his information, knowledge and belief.

Witness my hand and notarial seal.

[NOTARY'S SEAL.]

MAURICE J. CLARK,  
Notary Public.

My Commission expires 1st Monday in May 1916.

14 *Answer of the American Express Company.*

Filed September 17, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

In Equity.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Complainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association, Formed under the Laws of the State of New York, Defendant.

To the Honorable John C. Rose, Judge of the District Court of the United States, for the District of Maryland, sitting at Cumberland, Maryland:

The answer of American Express Company, the defendant in the above entitled suit respectfully shows:

1. That for the purposes of this suit, this respondent admits all the allegations of fact stated in the plaintiff's bill of complaint, but not the plaintiff's deductions therefrom, as therein set forth, such deductions being matters of law to be determined by this Honorable Court.

2. And further answering, this respondent says that in a suit in the Circuit Court of Tucker County, West Virginia, in Equity, entitled "The State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, plaintiff vs. the American Express Company, an association doing business in the State of West Virginia," an order or decree was, on the tenth day of August, 1914, passed by said Court, a copy of which is herewith filed as a part hereof, marked "Defendant's Exhibit No. 1", by which this respondent was enjoined

and prohibited from transporting intoxicating liquors to Tucker County, West Virginia, as set forth in said order; and this respondent is advised that it can not transport intoxicating liquors to Parsons, West Virginia, without the risk of violating the laws of the State of West Virginia and the terms of said injunction.

3. And this respondent hereby submits the matters of said bill to the determination of this Honorable Court for such order or decree as to the Court may seem proper.

And as in duty bound, etc.

HILL, ROSS & HILL,  
*Solicitors for Respondent.*

STATE OF MARYLAND,  
*Baltimore City, To wit:*

I hereby certify that on this sixteenth day of September, nineteen hundred and fourteen, before me, the subscriber, a Notary Public, in and for the State and City aforesaid, personally appeared Percy L. Wright, Superintendent, American Express Company, and made oath in due form of law that the matters and things stated in the foregoing answer are true, as therein set forth, to the best of his knowledge and belief, and that he is superintendent, American Express Company.

Witness my hand and Notarial Seal.

[NOTARY'S SEAL.]

GRACE E. HOWARD,  
*Notary Public.*

16

DEFENDANT'S EXHIBIT No. 1.

Filed September 30, 1914, as of 17 September, 1914, by Leave of Court.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, who Brings Her Suit at the Instance  
of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,  
vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business  
in the State of West Virginia.

This day, in Vacation for the Circuit Court of Tucker County, came the plaintiff, State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, against The American Express Company, an association doing business in the state of West Virginia, and presented her bill, duly verified, to the undersigned Judge of said Court, praying that she may be awarded an injunction against the said defendant, The American Express Company, restraining and enjoining it, its agents and employees, from accepting any liquors from non-resident consignors for

carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the Court, unless said defendant express Company has first ascertained, by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for

- 17 their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere, within the jurisdiction of the Court, unless said express company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the Court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself or by associating with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof. And that the defendant, The American Express Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within the said county
- 18 of Tucker, or elsewhere within the jurisdiction of the Court, other than is consistent with the allegations and prayer of said bill.

And said bill, having been read and considered, the injunction as therein prayed for is hereby awarded, and the said defendant, The American Express Company, its agents and employes, are hereby enjoined and restrained as prayed for in said bill, as above set forth in this order, which injunction is awarded without bond required of the plaintiff.

It is further ordered that an attested copy of this order be served upon the said defendant, The American Express Company, which service shall have the effect of enjoining the said express company according to the prayer of said bill and the injunction hereby awarded. And the clerk of the Circuit Court of Tucker County is hereby directed and ordered to enter this order in the Chancery

Record book of the Circuit Court of Tucker County, as a vacation order.

Done in Vacation in and for the Circuit Court of Tucker county at Keyser, Mineral county, West Virginia, this tenth day of August, nineteen hundred and fourteen.

F. M. REYNOLDS,  
*Judge of the Circuit Court of  
Tucker County, West Virginia.*

To Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County.

F. M. R.

Received and entered here, in vacation, this the 11th day of August, 1914.

Attest:

LAWRENCE LIPSCOMB, *Clerk,*  
By F. W. PRITT, *Deputy.*

19 STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that the foregoing is a true copy of an order that was entered in the above styled cause, on the 11th day of August, 1914, as the same appears of record in my office.

Given under my hand and the seal of said Court, this the 23rd day of September, 1914.

[SEAL OF COURT.]

LAWRENCE LIPSCOMB, *Clerk.*

STATE OF WEST VIRGINIA:

I, Francis M. Reynolds, Sole Judge of the Circuit Court of Tucker County, West Virginia, do hereby certify that Lawrence Lipscomb, whose genuine signature and attestation appears to the foregoing copy, was at the time of signing and attesting the same, the Clerk of said Court, and that the certificate and attestation thereto is in due form and by the proper officer and is entitled to full faith and credit.

Given under my hand this the 24th day of September, 1914.

FRANCIS M. REYNOLDS,  
*Judge of the Circuit Court of Tucker  
County, West Virginia.*

STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that Francis M. Reynolds, whose name appears to the foregoing certificate, is and was at the time of signing said certificate, the sole Judge of the Circuit Court of Tucker County, West Virginia.

Given under my hand and the seal of said Court, this the 25th day of September, 1914.

[SEAL OF COURT.]

LAWRENCE LIPSCOMB, *Clerk.*

20     *Petition of the State of West Virginia to be Made a Party  
          Defendant and Order of Court Thereon.*

Filed October 19, 1914.

In the District Court of the United States in and for the District of  
Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,

v.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business  
in the State of West Virginia.

To the Honorable John C. Rose, Judge of the District Court of the  
United States for the District of Maryland, Sitting at Cumberland,  
Maryland:

*The Petition of the State of West Virginia, a Body Politic and a  
Sovereign State, Tendered and by Leave of the Court Filed in  
the Above Entitled Cause.*

Your Petitioner, the State of West Virginia, respectfully repre-  
sents:

1. That she is a body politic and a sovereign State.

2. That heretofore, to-wit, on the tenth day of August, 1914, she  
presented her bill to the Honorable F. M. Reynolds, Judge of the  
Circuit Court of Tucker County, said State of West Virginia, (Tucker  
County being one of the counties composing the Sixteenth  
21     Judicial circuit of said State) praying for order of injunction  
as therein set out, and a duly attested copy of said bill is now  
herewith filed, marked "Petitioner's Exhibit No. 1", and is prayed  
to be taken and read herewith as part hereof.

That said Judge of said Circuit Court of Tucker County, having  
considered said bill and the prayer thereof, on said tenth day of  
August, 1914, awarded injunction as therein prayed for. A duly  
attested copy of said order awarding the injunction is now here  
filed, marked "Petitioner's Exhibit No. 2", and is prayed to be taken  
and read herewith as further part hereof.

Petitioner further represents that she now here adopts the allega-  
tions set forth in said bill for all purposes as though the allegations  
therein set forth were herein set forth in extenso.

Petitioner further represents that the plaintiff, the James Clark  
Distilling Company, a corporation, on and since the first day of  
July, 1914, has, by printed or written circular letters, order blanks  
and price lists, solicited citizens of the State of West Virginia, par-  
ticularly citizens thereof residing in said Sixteenth judicial circuit  
aforesaid to give orders to said plaintiff, the James Clark Distilling  
Company, for intoxicating liquors. That the purpose of such letters,

circulars, order blanks, etc., was to procure from the citizens of the State of West Virginia, particularly those residing within said Sixteenth judicial circuit aforesaid, orders for intoxicating liquors to be filled by the plaintiff, the James Clark Distilling Company; that the said James Clark Distilling Company intended to accept such orders and to ship such intoxicating liquors to such citizens

22 aforesaid by the defendant, the Western Maryland Railway Company.

Petitioner further charges that the plaintiff, the James Clark Distilling Company, has been, on and since the first day of July, 1914, shipping intoxicating liquors into the State of West Virginia, to the citizens thereof, without any effort to ascertain the character, ages and habits of the person who ordered the same, nor the purposes to which they intended to put such intoxicating liquors.

3. Petitioner further represents that, by provisions of the statute of your petitioner relative to intoxicating liquors in case of any sale, and the shipment of intoxicating liquors into the State of West Virginia by common or other carrier, the sale thereof is deemed to be made at the county wherein the intoxicating liquors are delivered. That the statutes of your petitioner, respecting intoxicating liquors, forbid the sale of, or soliciting of orders for, any intoxicating liquors in the State, except the sale of pure grain alcohol, by wholesale druggists to retail druggists, and by retail druggists upon prescription of reputable physicians or upon affidavit of the purchaser, but only then when to be used for medicinal, pharmaceutical, mechanical or scientific purposes; wine may also be sold under the laws of your petitioner when intended to be used for sacramental purposes. All other intoxicating liquors, by the laws of your petitioner, are forbidden to be sold.

4. Petitioner further represents that in any event respecting any sale and delivery of intoxicating liquors made within her jurisdiction, the common carrier, carrying and delivering the same is required to use good faith, due care and reasonable caution to ascertain that such intoxicating liquors are not to be received, possessed,

23 sold or in any manner used by any person interested therein in violation of the laws of your petitioner.

5. Petitioner further represents that the plaintiff, the James Clark Distilling Company, made no effort whatsoever to ascertain the age, habits or character of Floyd Rosier, the person named in the bill and who is alleged to have ordered the liquors in the bill mentioned from said plaintiff, the James Clark Distilling Company. And petitioner further represents that the plaintiff, the James Clark Distilling Company made no effort whatsoever to ascertain or to inform itself of the purposes, lawful or otherwise, that said Rosier intended to exercise respecting the intoxicating liquors mentioned in the bill. And petitioner further represents that the plaintiff, the James Clark Distilling Company, has on and since the first day of July, 1914, been shipping intoxicating liquors into the State of West Virginia, particularly to citizens in said Sixteenth judicial circuit aforesaid, which liquors were shipped into said State regardless of the purpose or use that the persons so receiving the same might make thereof.



And petitioner further represents that the provisions of her prohibition statute are in exercise of her police powers for the protection of public health, peace and morals of her citizens and residents within her jurisdiction.

6. Petitioner denies that the plaintiff, the James Clark Distilling Company, is entitled to the mandatory injunction prayed for in its bill.

7. Your petitioner further most respectfully represents that in view of the allegations herein, that she should be permitted to intervene herein and be made a party to this cause, and she therefore prays that she may be permitted to file this petition and be made a party herein.

24 And your petitioner further prays that the plaintiff, the James Clark Distilling Company, may be denied the relief sought by its bill, and may your petitioner have all such other, further, general and special relief as the nature of her cause may require or to equity may appertain.

STATE OF WEST VIRGINIA,  
A Body Politic and a Sovereign State,  
By HER COUNSEL.

FRED O. BLUE,  
*Counsel for the State of West Virginia.*

STATE OF WEST VIRGINIA,  
*County of Kanawha, To wit:*

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition of the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

FRED O. BLUE.

Taken, sworn to and subscribed before me this 17th day of October, 1914.

My commission as Notary Public expires on the 26 day of April, 1923.

[NOTARY'S SEAL.]

FRANK LIVELY,  
*Notary Public in and for the  
County and State Aforesaid.*

25 In the District Court of the United States for the District of Maryland, at Cumberland, Md.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
vs.  
THE AMERICAN EXPRESS COMPANY.

Upon the foregoing petition, exhibits and affidavit, it is ordered, by the District Court of the United States for the District of Mary-

land, this 19th day of October, 1914, that said petitioner, The State of West Virginia, be permitted to file said petition and be made a party in the above entitled cause as prayed in said petition, provided no cause to the contrary be shown on or before the 29th day of October, 1914; a copy of said petition and this order shall be served forthwith by the Clerk upon the plaintiff herein or its counsel.

JOHN C. ROSE,  
District Judge.

26

## PETITIONER'- EXHIBIT No. 1.

Filed October 19th, 1914.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, Who Brings Her Suit at the Instance of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,

vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business in the State of West Virginia.

To the Honorable F. M. Reynolds, Judge of the Circuit Court of Tucker County:

*The Bill of Complaint and Prayer of the State of West Virginia, Who Brings Her Suit at the Instance of Fred O. Blue, State Commissioner of Prohibition, against the American Express Company, an Association Doing Business in the State of West Virginia.*

1. Complaining plaintiff says that she is a body politic and a sever-ign state, and that the defendant, The American Express Company, is and was at the times herein referred to, an association doing business in the State of West Virginia, and is a common express carrier, operating in certain counties within the states of Maryland, Pennsylvania and West Virginia, over the ra-lroad lines of The Western Maryland Railway Company; that among other co-nties in West Virginia wherein the defendant Express Company operates are Mineral, Morgan, Grant, Tucker, Randolph, Barbour and Pocahontas; the said defendant express company maintains quite a large number of stations within the said states aforesaid, where it has agents and employes, and at which stations it receives and delivers express packages of all kinds; that among other stations in West Virginia where said express company has offices and agents

27 are those of the towns of Thomas, Davis, Parsons and Hendricks, in the county of Tucker; that the main line of said The Western Maryland Railway Company, over which the defendant express company operates, runs from the city of Baltimore, Mary-

land, to Elkins, West Virginia, passing through the city of Cumberland and the town of Westernport, said last named city and town both being in said state of Maryland, at which places the defendant express company has and maintains offices and has agents and employees, and where it receives and delivers express packages offered to it for carriage and delivery.

2. The plaintiff further represents that at the general election held in the state of West Virginia in November, 1912, the people of said state ratified a proposed amendment to the constitution of said state, whereby on and after the first of July, 1914, the manufacture, sale and keeping for sale of malt, vinous, or spirituous liquors should be prohibited in said state; that said amendment so ratified was and is in the words and figures following:

"SEC. 46. On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

3. Plaintiff further says that at the regular session of 1913, the legislature of West Virginia enacted chapter 13, Acts of 1913, the State Prohibition Law, in effect on and after July 1st, 1914, said act being enacted for the purpose of carrying into effect the provisions of the said constitutional amendment aforesaid.

4. The plaintiff further represents that under the laws of the state of West Virginia, on and since the first day of July, 1914, it has been unlawful to manufacture, sell, keep or store for sale, or offer or expose for sale, within said state, liquors as liquors are defined by section one of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said state for any person, acting for himself, or by, for or through another, to manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for, any liquors, as liquors are defined by section I of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said state for one to act as the agent or employe of the purchaser of liquors, as liquors are defined by said Act; and further, that on and after the first day of July, 1914, in case of a sale of liquors, in which shipment or delivery thereof is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery of such liquors is made by such carrier to the consignee, his agent or employe.

5. Plaintiff further represents that on and since the first day of July, 1914, it had been unlawful, within said state, for any person to

advertise or give notice, by signs, billboards, newspapers, periodicals, or otherwise, for himself or another, of the sale or keeping for sale of liquors, or to circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical, or other written or printed papers in which such advertisements or notices are given.

6. Plaintiff further represents that the Cumberland Brewing Company is a maker and manufacturer of beer, owning and operating a large brewery; the Cash Liquor Store is a liquor house, John A. Whitman is a liquor house, Smith and Roman is a liquor firm, James Clark Distilling Company is a distiller and seller of liquors, C. A.

Hice is a retail jug and bottle house, the German Brewing

29 Company is a brewer and seller of beer, the Diamond Liquor House, all of said city of Cumberland, and Peter Weisengoff,

a liquor dealer of said town of Westernport, all of whom, as well as others named herein, are engaged in the business of either manufacturing or selling, or both, liquors, as defined by said act, and all and each are engaged in the effort to receive orders and make sales and shipments of liquors to citizens residing in the state of West Virginia, particularly along the line of the defendant express company. That some of said firms and manufacturers, if not all, have in various ways sought to advertise or give notice of their business to citizens and residents of West Virginia, and have, in various ways, circulated and distributed price lists, circulars and order blanks, soliciting orders for and advertising liquors to the citizens of West Virginia, thereby bringing to the attention of such citizens and residents the articles of liquor kept and stored for sale by them respectively, to induce citizens and residents of said state to give orders for liquor they otherwise would not have thought of giving; that for the purpose of delivering liquors to the citizens and residents of said state along the line of the defendant express company, including the said county of Tucker, said persons and firms have shipped by the defendant express company such liquors to divers citizens and residents of West Virginia, for delivery to said citizens and residents at stations on the line of said defendant express company, within the state of West Virginia, including citizens residing in the county of Tucker. That in addition to shipping liquors by the defendant express company, said persons and firms aforesaid also have shipped such liquors by the Western Maryland Railway Company, a common carrier, operating as aforesaid. And thereupon, and as illustrative of the quantity of liquors carried and delivered by the defendant express company from non-resident liquor dealers to citizens and residents of the state of West Virginia, including citizens and residents residing at the town of Thomas, in the county of Tucker within said state, plaintiff avers and charges that the defendant express company received from non-resident liquor dealers, and carried and delivered to citizens and residents at said town of Thomas, from the 1st day of July, 1914, to the 21st day of July 1914, inclusive, approximately three hundred and fifty separate consignments of liquor; and further, as illustrative of the disposition and efforts on the part of non-resident liquor dealers to sell and deliver liquors to citizens and

residents of Thomas plaintiff further represents that there were carried and delivered by the Western Maryland Railway Company, a common carrier operating as aforesaid, within said period twenty-one days aforesaid, approximately three hundred separate freight packages of liquors from non-resident liquor dealers to citizens and residents of said town of Thomas.

Plaintiff is advised and so charges that the sales of such liquors, under and by virtue of the laws in such cases made and provided, were made at the place of delivery by the carrier to the consignees of such liquors, in all instances wherein such liquors were shipped by the consignors, upon orders solicited in any way by them from the said consignees within the state of West Virginia, or when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any laws of the state of West Virginia.

7. Plaintiff further represents that by an act of the United States Congress, known as the Wilson Act, (26 Stat. 713, c. 728) it is provided:

"That all fo-mented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or Territory be subject to the operation in effect of the laws of such state or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

31 8. Plaintiff further represents that by act of the United States Congress passed subsequent to the Wilson Act, and known as the Webb-Kenyon Act (Act Cong. March 1, 1913, c. 90, 37 Stat. 699) it was provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, fermented, or other intoxicating liquor or any kind, from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, into any other state, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state or Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

And plaintiff further represents that she is advised and so charges that the defendant express company, on and since the first day of July, 1914, could not, nor can it now, lawfully deliver any liquors to any persons in West Virginia, except to those who have ordered the

same for their lawful, personal use, without solicitation on the part of the consignor, nor lawfully deliver any liquors to the consignee thereof when such liquors were or are intended by any person interested therein to be received, possessed, sold or in any manner used in said state in violation of any of the laws thereof. And thereupon plaintiff further says that she is advised and so charges that it was and is the duty of the defendant express company, through its agents and employees, before acceptance of liquors from non-resident consignors for carriage and delivery thereof to consignees in West Virginia, to ascertain, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to the consignors for their own lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state of West Virginia.

32 9. Plaintiff further says that she is advised and so charges that the defendant express company, through its agents and employees, has been accepting, on and since July 1, 1914, and is yet accepting, (perhaps inadvertently) liquors from non-resident consignors for carriage and delivery thereof to consignees in the said State of West Virginia, among others being consignments of such liquors to citizens and residents of said county of Tucker, without having first ascertained, by acting in good faith with due diligence and caution, from the consignors and consignees, respectively, whether such liquors were ordered by the consignees for their own lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance, carriage and delivery thereof by the defendant to the consignees, for their own lawful personal use without intent by any person interested therein to be received, possessed, sold, or in any manner used in said state of West Virginia in violation of any of the laws thereof; and that said defendant through its agents and employees, has made delivery of such liquors to citizens and residents in the said county of Tucker, without having ascertained, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful, personal use without solicitation on the part of the consignors, and whether such liquors were to be received, possessed, or in any manner used by any person interested therein in violation of any laws of said state.

10. Plaintiff further represents that on and since the first day of July, 1914, it has been unlawful in said state of West Virginia for any person to associate with others to aid, assist, or abet in keeping and maintaining any club house, or other place, in which any liquor is received or kept for the purpose or use, gift, barter, or sale as a beverage, or for distribution or division thereof among the members of any club or association by any means whatsoever, and thereupon plaintiff further says she is informed and so charges that at certain towns in West Virginia on the line of the defendant express company, including the said town of Thomas,



liquors are procured by persons associating together for the purchase thereof, such liquors being ordered and shipped in the name of one of the parties so associating together, usually in the name of one known as the "boarding Boss", such liquors so purchased being intended for the joint use of those so associating together, the individual members whereof are usually known as "boarders"; that such liquors are purchased out of a joint fund to which the "boarders" contribute, and are received, usually, in the name of the "boarding boss", although at times in the name of one of the "boarders", and are kept, stored and distributed at a common place kept or maintained by the "boarding boss" himself, or by the said "boarding boss" and those associating with him as "boarders", or by one of the said "boarders" and those associating with him as "boarders", or by the "boarders" themselves, associating together, for the purpose of use or gift, as a beverage, or for distribution or division among the "boarders"; and such liquors are there used or given away as a beverage by those who so associate together. And thereupon plaintiff is advised and so charges, as she is informed and believes, that liquors have been shipped by non-resident liquor dealers, carried by the defendant express company, and delivered by it to the "Boarding boss" or member of an association as aforesaid; and particularly does the plaintiff charge that the defendant express company by and through its agents, in the month of July, 1914, deliver to Joe Venikitis, either a "boarding boss" or a "boarder" at said town of Thomas, four and seven eighths gallons of whiskey, which whiskey was received by him for the purpose of use or gift as a beverage and for distribution or division among the "boarders".

34        who had contributed either directly or indirectly, to a common fund for the purchase of said liquors, and who kept or maintained a common place where such liquors were stored or kept, and distributed or divided among those associating together. And thereupon the plaintiff further says she is advised and so charges that on and since the first day of July, 1914, it has been and is the duty of the defendant express company, by and through its agents, to make no delivery of liquors to any person in West Virginia except to a person who ordered the same for his own lawful, personal use and not for the use of others, particularly any association of persons, associating for the purpose of purchasing liquors to be kept and stored at a place kept or maintained by them in the manner as aforesaid, and there used or given away as a beverages or distributed or divided among those associating together.

11. Plaintiff further represents that she is advised and so charges that consignees of liquors have endeavored to and probably have in some instances, procured deliveries thereof from the defendant express company, at stations in the said county of Tucker, by the use of fictitious names and otherwise. And thereupon plaintiff further says she is advised and so charges that it is and has been the duty of the defendant express company, since the 1st of July, 1914, to deliver no liquors except upon the signing of the record by the consignee thereof, in his own proper person, and then only when the consignee has ordered the same for his personal, lawful use, with no intention

that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any laws thereof.

12. Plaintiff is advised and so charges that notwithstanding that the brewery and liquor dealers hereinbefore named are non-  
35 residents of the state, yet nevertheless they do not have the right, under the interstate commerce clause of the federal constitution, to solicit orders for liquors nor to sell liquors in the state of West Virginia, nor to ship liquors into the state of West Virginia, when the same are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the said state, and that the interstate character of such liquors, as advertised or sold by them, is divested by the Webb-Kenyon act in all instances wherein they advertise, solicit or sell liquors in the state of West Virginia or to any citizen thereof in the said state, when any such liquors are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the said state.

13. Plaintiff further says she is advised and so charges that it is the purpose of said brewers and liquor dealers aforesaid, as well as other outside brewers and liquor dealers, to advertise their liquors in the state of West Virginia, and to solicit in said state, from the citizens thereof, orders for liquors, and that they intend to ship into West Virginia by defendant express company, the liquors advertised by them and which they have for sale, particularly along the line of the defendant express company in the state of West Virginia, regardless of the purpose or use the consignee may have respecting such liquors. That it is the purpose of the outside liquor dealers to ship their liquors over the line of the defendant express company to any person in West Virginia who may order the same without ascertaining, and regardless of, the purpose or use the consignee may have respecting such liquors, and that the defendant express company has been and will continue to carry and deliver such liquors to such citizens and residents of such state, including those residing in said  
county of Tucker; and therefore to permit the defendant ex-  
36 press company to deliver such liquors is to make the same a common nuisance for the keeping, storing, selling and delivering of liquors within the state of West Virginia, if the defendant express company is permitted to deliver such liquors to the consignees when the liquors are to be received, possessed, sold or in any manner used by the consignee in violation of the law of the state of West Virginia.

14. Plaintiff therefore further represents that inasmuch as the outside liquor dealers are beyond the jurisdiction of the criminal courts of the state, and perhaps may therefore escape criminal prosecution under the laws of said state, she having no assurance that she can procure the persons of such outside liquor dealers for the purpose of trial, she is therefore advised and so charges that she has the right to invoke the aid of a court of equity to restrain and enjoin the defendant, the American Express Company, from delivering any consignment of liquors from outside liquor dealers to any point upon the line of said carrier or elsewhere in the state of West Vir-

ginia within the jurisdiction of the court, unless the said defendant, through its agents and employees, before acceptance of liquors from non-resident consignors, for carriage and delivery thereof to consignees in said county of Tucker, ascertain by acting in good faith, with due diligence and caution, whether such liquors were ordered by consignees thereof for their lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to consignees for their lawful, personal use, without any intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state of West Virginia.

In consideration of the premises, and inasmuch as the plaintiff is without adequate remedy save in a court of equity, she  
37 therefore prays that she may be awarded an injunction against the said defendant, the American Express Company, restraining and enjoining it, its agents and employees, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the court, unless said defendant express company has first ascertained, by acting in good faith, with due diligence and caution that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere within the jurisdiction of the court, unless said express company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the court, when such liquors were procured for himself or for himself and those associating with him, to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself, or by associating  
38 with others, or which he, by himself, or by association with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person, unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used

in said state in violation of any law thereof. And that the defendant, the American Express Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within said county of Tucker, or elsewhere within the jurisdiction of the court, other than is consistent with the allegations and prayer of this bill; and may the defendant named in the caption of this bill be made party defendant hereto; and may the plaintiff have all such other, further, general and special relief as the nature of her case may require or to equity may appertain. And she will ever pray, etc.

STATE OF WEST VIRGINIA,  
*Who Brings Her Suit at the Instance of*  
*Fred O. Blue, State Commissioner of Prohibition,*  
 By COUNSEL.

FRED O. BLUE,  
 W. K. PRITT,  
*Counsel for Plaintiff.*

39 STATE OF WEST VIRGINIA,  
*County of —, To wit:*

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition for the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

FRED O. BLUE.

Taken, sworn to and subscribed before me this 7th day of August, 1914.

My commission expires on the 7th day of April, 1923.

FRANK LIVELY,  
*Notary Public in and for said County and State.*

STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that the foregoing is a true copy of a Bill of Complaint that was filed in the chancery cause of The State of West Virginia etc., against The American Express Company &c., as the same appears on file in my office.

Given under my hand and the seal of said Court, this the 12th day of October, 1914.

[Seal of Circuit Court of Tucker County.]

LAWRENCE LIPSCOMB, *Clerk.*

40-44 STATE OF WEST VIRGINIA:

I, Francis M. Reynolds, Sole Judge of the Circuit Court of Tucker County, West Virginia, do hereby certify that Lawrence

Lipscomb, whose genuine signature and attestation appears to the foregoing record, was at the time of signing and attesting the same, the Clerk of said Court, and that the certificate and attestation thereof is in due form and by the proper officer and is entitled to full faith and credit.

Given under my hand this the 12th day of October, 1914.

FRANCIS M. REYNOLDS,

*Judge of the Circuit Court of Tucker County,  
West Virginia.*

STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that the Honorable Francis M. Reynolds, whose name is signed to the foregoing certificate, was at the time of signing said certificate the Sole Judge of the Circuit Court of Tucker County, West Virginia.

Given under my hand and the seal of said Court, this the 12th day of October, 1914.

[Seal of Circuit Court of Tucker County.]

LAWRENCE LIPSCOMB, *Clerk.*

\* \* \* \* \*

45     *Order of Court Making the State of West Virginia a Party  
Defendant.*

Filed December 9, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business  
in the State of West Virginia.

It appearing to the Court that no cause has been shown why the petitioner, The State of West Virginia should not be made a party in the above entitled cause, *vs* prayed in its petition, filed herein, on the 19th day of October, 1914, although due service of said Petition and Order of Court passed thereon on the 19th day of October, 1914, was admitted.

It is thereupon ordered by the District Court of the United States for the District of Maryland, this 9 day of December, 1914, that said Petitioner, The State of West Virginia, be, and it is hereby made a party defendant in the above entitled cause as prayed in said petition.

JOHN C. ROSE,  
*District Judge.*

46 District Court of the United States, District of Maryland, at  
Cumberland, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-  
plainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed  
under the Laws of the State of New York, Defendant.

*Transcript of Evidence.*

GEORGE J. GOCKE, a witness of lawful age, produced by the plain-  
tiff, being duly sworn and examined by Mr. Walter C. Capper, at-  
torney for plaintiff, stated that he was bookkeeper for the James Clark  
Distilling Company, plaintiff in this case, and he identified a paper  
dated Parsons, West Virginia, August 19, 1914, as being an order  
received by the James Clark Distilling Company at Cumberland,  
Maryland, through the United States mail from Floyd Rosier of  
Parsons, West Virginia. Thereupon the following occurred:

Q. Will you state what knowledge you had in reference to the uses  
that Rosier intended to put that alcohol to?

A. My knowledge of the order was he intended the alcohol for  
his own personal use.

(COURT:)

Q. This is an order for alcohol in the form of pure spirits, or is it  
alcohol in some other form?

A. It is 188% proof alcohol.

(COURT:)

Q. That is pretty near pure alcohol?

A. Yes, sir.

(COURT:)

Q. Whiskey is about 100% proof?

47 A. Yes, sir, or less.

Q. Pure grain alcohol, is it?

A. Yes, sir.

Q. Will you state whether or not the James Clark Distilling  
Company, or any of its agents, in any manner solicited any order  
from Mr. Rosier?

A. They certainly did not.

Q. And you say they had no knowledge whatever to what use  
he intended to put that shipment?

A. Other than his statement, that he intended to put it to his own  
use.

Q. How much alcohol does the order cover?



A. Four quarts—one gallon.

Q. And the price was?

A. Four dollars.

Q. Did the price accompany the order, and if so, in what way?

A. The money accompanied the order in the shape of a U. S. Postal Money Order.

Q. And that is exhibited here?

A. Yes, sir.

On Cross-examination by Mr. Benj. A. Richmond, attorney for the Western Maryland Railway Company, defendant, witness stated that Mr. Rosier stated that he wanted the alcohol for his personal use, but that witness had no knowledge as to what way he was going to personally use it. Outside of a use for mechanical purposes, witness would not use it for any purpose except rubbing, because it is not fit to drink, being too strong. The order speaks of 188% proof,

48 which is the percentage or strength of the alcohol. It would have an intoxicating influence if a man should drink it.

The James Clark Distilling Company did not know Rosier before he sent this order in and witness did not know whether that company had had business dealings with him before. Rosier sent the order on a plain piece of paper and witness did not know how Rosier got the address of the plaintiff firm. That firm did not employ any traveling salesmen to solicit business in that part of the country. The plaintiff tried to ship the order by American Express and they refused to ship it; they then tried to ship it by railroad and they refused it.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that he understood that pure grain alcohol is used to increase the strength of certain intoxicating beverages. At the time this order was received the plaintiff company did not publish advertisements in newspapers, but had published such advertisements, possibly a month or two months before. Witness could not say whether this order was the result of some such advertisement previously published. After the first of July, 1914, plaintiff company did not publish any advertisements in West Virginia. Witness did not know how Mr. Rosier knew that the price of the alcohol was \$1.00 a quart; that Rosier may have given previous orders. Witness did not have any knowledge that Rosier intended the alcohol for his own personal use except what Rosier stated in his letter.

Thereupon Mr. Fred O. Blue, State Commissioner of Prohibition of the State of West Virginia moved to be made a party defendant in each case, which motion was granted and Mr. Blue proceeded to further cross-examine the witness. On such cross-examination

49 the witness stated that the general business of the James Clark Distilling Company is the distillation and sale of whiskey. That company does not manufacture alcohol but only rye and malt whiskey. Does not sell any beer, but sells quite a lot of the alcohol such as was ordered by Rosier. Since the first of July, 1914, that company has sent written or printed circulars into the State of

West Virginia to solicit business, but not to any great extent. Witness could not say whether any of these circulars had been sent into Tucker County or whether Rosier had received any of them. These order blanks and solicitations gave the prices of all the different grades of liquor and alcohol sold by the plaintiff company. Witness does not know whether any such order blanks sent into West Virginia since the first of July came back to the company with orders. Witness believes that the kind of alcohol mentioned in Rosier's order could be diluted and used as a beverage, but does not know whether in fact it is so used. Witness cannot state whether any other shipments were made after the first of July to Rosier, or the amount of liquors that the plaintiff company has shipped into the State of West Virginia since the first of July.

50 JOHN KEATING, a witness of lawful age, produced by the plaintiff, being duly sworn was examined by Mr. WALTER C. CAPPER, as follows:

He is Vice-President and Treasurer of the James Clark Distilling Company which is engaged in the distilling and wholesale and retail liquor business. Witness had no knowledge of the order of Floyd Rosier except that it came in regular mail order business, and as that business is a cash business it does not become part of the company's record, and witness cannot say whether that company had made any previous shipments to Rosier or ever received any other order for him. Alcohol of the kind covered by the order is used for rubbing purposes and also for drinking, by mixing a gallon of such alcohol with a gallon of water. Sometimes they put it on a stove and put sugar in it, so they get whiskey for fifty cents a quart. That is to say they get it rectified instead of pure neutral spirits. They buy a gallon of alcohol and reduce it and so get alcohol rectified, but without the whiskey flavor. Witness does not know whether the firm solicited this order, unless it came in from advertising which had been carried on for forty years. The James Clark Distilling Company having been in business for forty years and having advertised for mail order business for thirty years. The company is a Maryland corporation with its principal office located in Cumberland. Since the first of July the company had been carrying on its regular mail order advertising in West Virginia. The custom of the company is to send out between fifty and one hundred thousand circulars every year. They get the names from the Clerks of the Courts of the various counties showing registered voters of their  
51 county, with the post office addresses, and also purchase names from companies that make it a business of going from court to court and getting the names.

Cross-examination by Mr. BENJ. A. RICHMOND, attorney for the Western Maryland Railway Company:

The one hundred thousand circulars of which witness spoke of as having been sent out during a year were not sent to West Virginia alone, but also to Maryland, Virginia and Pennsylvania. The cir-

culars sent to points in West Virginia since the first of July, 1914, are the same as circulars sent to the same points prior to July 1, 1914. The company does not make beer, but manufactures spirituous liquors and also buys spirituous liquors. The sale of alcohol forms quite a large part of the company's usual business. Witness had never heard of Rosier before receiving this order marked for his personal use. Witness did not know what he really wanted to use it for, he may have wanted it to drink and he may have wanted it to rub himself with. Such alcohol is also used for the purpose of fortifying beers or wines. Plaintiff company attempted to ship the liquor by American Express but they refused to accept it and they then applied to Western Maryland Railway Company which also refused to accept it. Application was made to the Agent of the Railway Company and also to the Superintendent by the transferman of the plaintiff company. Witness understood that the defendant companies gave as a reason that they would not accept the shipment that an injunction had been issued against them. The James Clark Distilling Company has a branch house in Washington, and did have one at

52 Parkersburg, West Virginia, until June 30, 1913. It manufactures liquors just outside of Cumberland. The company's mail order business had been going on for thirty years. The order from Rosier was accompanied by a post office money order to pay for the shipment. Witness does not know how Rosier came to know that four quarts of alcohol would cost four dollars, unless he got it from one of the company's circulars. Witness could not state any manner in which the Western Maryland agent at Cumberland or at Baltimore, when applied to to ship liquors could ascertain whether the order for the liquor was given upon solicitation by the plaintiff company. If the railway company were required to ascertain whether Rosier wanted this liquor for his personal use, or whether he had ordered it on solicitation, witness does not know how they could do so. Witness stated that when a man says on the order that he wants it for his personal use "That is the only knowledge we have." In answer to a question by the Court, witness stated that the James Clark Distilling Company had not sent any circulars into West Virginia since the first of July advising applicants that the company would be unable to ship orders unless wanted for their personal use. The company until within thirty days of the trial had never kept the names of customers from whom orders were received. Names had always been obtained from the Clerks of the Courts and the company kept no list.

On cross-examination by Mr. John Philip Hill, attorney for American Express Company, witness stated and it was admitted by plaintiff that the shipment was offered to American Express Company and refused because of an injunction against it, copy of said injunction being filed as an exhibit with the answer of the  
53 American Express Company; that said injunction was duly served on the express company prior to its refusal to accept the package. The same admission was also made in respect to the Western Maryland Railway Company.

On further cross-examination by Mr. FRED O. BLUE, witness testified as follows:—

Q. Upon direct examination you were asked as to what uses the consignee might make of this alcohol he ordered. Don't you know that also up in that country that alcohol being diluted could be used for speak-easy purposes?

A. That might be true. I have never been to one of their speak-easys, and I don't know what they use it for.

Q. In other words, while alcohol might be used for lawful purposes by Rosier, he also might use it for unlawful purposes?

A. Yes, I suppose he could.

Q. In view of that fact, when you received this order from a man unknown to you, did you seek to inform yourself as to what kind of a man he was, and the purposes to which he might put the alcohol?

A. We had no interest in Mr. Rosier. He was twenty-one years of age, and I have seen people drinking pure alcohol in West Virginia twenty-five years ago.

(COURT:)

Q. I presume you didn't know whether he was twenty-one or not?

A. We never get anything but a list of registered voters.

(COURT:)

54 Q. Was he on the list?

A. I don't know whether he was or not.

Q. You didn't know when you accepted this order whether Rosier was a minor or a man of full age?

A. No, we did not, and we didn't know whether he was a minor or not. If we had known he was a minor, we wouldn't have shipped it.

Q. Did you know whether he was a man of intemperate habits?

A. No.

Q. Did you know whether he was a man given to the use of narcotic drugs?

A. We didn't know anything about the man.

Q. Did you seek to ascertain these facts from this stranger, whether he was a man of intemperate habits or given to the use of narcotic drugs, or was a minor?

A. I don't think it is required of us to find out from a man his general reputation.

(Court instructs witness to answer the question.)

Q. (Question repeated by stenographer.)

A. No.

Q. Are the circulars or were the circulars you sent into West Virginia printed ones of a general kind?

A. Yes, sir.

Q. Do you yet have some of those same printed circulars, the same kind that you sent in to West Virginia since July 1, 1914?

A. That is, if any was sent.

55 Q. Upon your direct examination, you stated you had sent circulars into West Virginia, and I believe since the first of July, 1914?

A. I don't know whether we have since the first of July, but I guess we have; we have the business going on all the time.

Q. I will ask you to state whether or not you did send circulars and order blanks into West Virginia since the first of July, 1914?

A. I suppose we did. Personally, I couldn't say. I didn't see the circulars enclosed, and I didn't address them and didn't mail them.

Q. Who is connected with your Company who could tell us that?

A. I think I am safe in saying we did.

Q. Can you produce for the purposes of the Court and counsel, and make a part of this record some of the same kind of printed circulars and some of the blanks that you sent into West Virginia since the first of July, 1914?

A. I think so.

Q. Will you do so?

A. If our counsel requires it and wishes it.

(Papers produced—papers and blanks asked for produced by the witness.)

(COURT:)

Q. What is the reason on the back of this circular you have printed, "We put whiskey in barrels and half barrels with or without labels, at customer's option?"

56 A. Before the Prohibition law went into effect, in local option counties we had quite a business in whiskey put up in barrels and half barrels, and they took out a Government license, and have it bottled under a hundred different brands.

(COURT:)

Q. And if it was an honest man, he would prefer that the barrel be labeled?

A. Yes, sir, not the barrels, but the bottles; we had to brand the barrels on the outside.

Q. Since the first of July, your Company has been shipping whiskey into the State of West Virginia?

A. Yes, sir.

Q. The same as before?

A. Yes, sir.

Q. You made no effort to ascertain the character and ages and habits of the persons who ordered it, nor the purposes to which they intended to put the liquor, did you?

A. No, I don't think we have. I will produce circulars to show that the man must state he is twenty-one years of age, and wanted it for his personal use.

Q. When did you get those?

A. I don't know whether any of them are out or not. They are in the hands of the printer.

Q. Were any notices published by you in the papers of West Virginia, that the applicant will have to be twenty-one years of age, and that the liquor is for his own use?

A. We have not, but we are getting the circulars up as fast as possible, and will have printed under the man's name that  
57 "I am twenty-one years of age, and this is for my personal use."

(COURT:)

Q. You haven't sent those out yet?

A. I don't think so; I am not sure.

Q. If your Company received an order for as much as a barrel of whiskey from West Virginia, would you have shipped it without making inquiry, as to what the person ordering it intended to make of that liquor?

A. I think we would.

Q. You would have shipped it then?

A. Yes, sir.

Q. Without making inquiry?

A. Yes, sir.

Q. You have been shipping into the counties of West Virginia a great deal of liquors since the first of July?

A. Yes, sir.

Q. In large and small quantities?

A. Not very large quantities; the quantities have been small since the first of July.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that at the time this shipment was offered to American Express Company, witness did not believe that that company had any more knowledge of the order for the alcohol or the person who made it than the witness himself had.

58 Mr. STANTON ENNES, called as a witness for defendant being first duly sworn and examined by Mr. Benj. A. Richmond, attorney for defendant, The Western Maryland Railway Company stated that he was General Superintendent of that company with headquarters at Hagerstown. Beginning at Cumberland that company has on its line extending from Cumberland, Maryland, into the State of West Virginia regular stations and agents at the following points: Keyser, Westernport, Luke, West Virginia Central Junction, Shaw, Blaine, Potomac Manor, Harrison, Elk Garden, Schell, Gorman, Bayard, Dobbin, Henry, Thomas, Douglas, Hendricks, Davis, Hambleton, Parson, Montrose, Elkins, Bellington, Durbin, Beverly, Mill Creek and Huttonsville. Parsons is in Tucker County, West Virginia; from Tucker County to Cumberland the road runs through Grant and Mineral Counties. The company has a number of stations in the State of Pennsylvania where it receives shipments in Franklin, Adams, Fayette and Somerset Counties, and also quite a number of stops in Maryland where it receives shipments, such as Westminster, Hagerstown and Cum-



berland. Witness has read the terms and requirements of the injunctions granted by Judge Reynolds of Keyser and thinks it is physically impracticable for the company in the shipments of liquors to observe the terms of the injunction. When witness first saw the injunction — and in an effort to comply with it he thought that in doing business with an old reliable house like the plaintiff in this case the railroad company might accept the statement of the shipper that so far as solicitation was concerned the shipper had complied with the law. But it occurred to witness that if the shipper

59 had advertised in a Cumberland paper or some outside paper and these papers were carried into West Virginia that that would be a solicitation, and that further when it came to doing business with a man not so well established as plaintiff in this case the railroad company was absolutely helpless in determining whether the sale had been solicited or not, and when it came to ascertaining whether the receiver of the goods was going to use them in violation of the West Virginia law, witness thought it impossible to comply with the terms of the injunction. The rate on the shipment to Parsons, West Virginia would have been thirty cents and it would mean that at all stations in West Virginia the railroad company would have to take means to carry out these instructions, and witness did not see how the company could do it in a commercial way, taking into consideration the rates. Witness supposed the company in order to comply with the terms of the injunction would have to maintain some one to determine who the receiver was and what use he was going to make of the liquor. Witness gave the thing up as impracticable and instructions were given that the company could not comply with the law, (the injunction). The difficulty would be applicable at all stations in Maryland and Pennsylvania, where the company received goods. The company has not a sufficient force of detectives at stations in these three states to determine these questions and the costs of maintaining such a force would run into prohibitive figures.

Cross-examination by Mr. LAWRENCE MAXWELL, attorney for plaintiff:

Witness issued a verbal order against the reception of interstate liquor into West Virginia; this order absolutely forbade the receipt of any interstate shipment of liquor into Grant, Tucker and Mineral Counties. It was issued a day or two after notice of the injunction and included all liquor delivered to the railroad 60 company by a shipper or a connecting carrier. It was an absolute refusal to carry interstate shipments of liquor into those counties without regard to the quantity or any other condition or circumstance. The injunction was dated August 11th and this order was issued a day or two after the injunction. The witness has no knowledge that the company knew that the injunction was awarded. Does not know whether it was awarded ex parte or not. The company took no steps to have the injunction modified or vacated. Mr. Richmond as counsel for the company under authority of the witness ordered the shipments stopped.

61      WALTER A. YINGLING, a witness for defendants, being examined by Mr. Benj. A. Richmond, testified that he was freight agent at Cumberland for defendant, The Western Maryland Railway Company, and that after the injunction in Tucker County had been served he received instructions from Mr. Richmond, as counsel for that railway company not to ship any liquor into Grant, Tucker and Mineral Counties, West Virginia, and that none had been shipped. The railway company carries liquor for personal use into other counties in West Virginia from Cumberland when the order states that the liquor is for personal use and there is "nothing suspicious about it". Witness remembers the gallon of alcohol involved in this case being brought into his office for shipment sometime after August 14th, after the injunction had been served and after witness had received the instructions above noted. The shipment was brought to the railway company's freight office by Hirshman's transfer, and was accompanied by three or four gentlemen who wanted the witness to accept it for shipment to Parsons in Tucker County, West Virginia. Witness did not accept the shipment and gave as his reason for not accepting it that he had instructions from his Superintendent through General Counsel for the company, that on account of the injunction issued by Judge Reynolds the railway company was prohibited from accepting any liquor shipments for Grant, Tucker and Mineral Counties. But for these orders and the injunction, witness probably would have accepted the shipment. There was nothing suspicious about the shipment or the order; on the face of it it looked like a bona fide order. One of the gentlemen stated that he had offered the shipment to the Traffic Agent, Mr. Getty, and also to the Superintendent, Mr. Steiner of the Railway Company.

62      On cross-examination by Mr. Capper, counsel for plaintiff, witness stated that he refused the shipment solely because he had received orders from his superiors to receive no shipments of liquor for those three counties; that the plaintiff showed him the order and if he had been free to act would not have regarded this shipment as presenting anything suspicious.

Thereupon defendant, American Express Company offered in evidence Exhibit No. 1 filed with its answer. Thereupon the following occurred:

Mr. MAXWELL (counsel for plaintiff): "You admit that your Company has made no effort to dissolve the injunction, and that the injunction was issued *ex parte*?"

Mr. BLUE (representing the State of West Virginia): "It was issued as a preliminary injunction and no steps taken by the Defendant in either case."

Mr. RICHMOND (counsel for Western Md. Railway Co.): "The Western Maryland has not entered an appearance in Tucker County, I don't think. They have made no motion to dissolve the injunction."

Mr. MAXWELL: "Filed no answer?"

Mr. RICHMOND: "Filed no answer, and just stopped right there and obeyed the order."

Mr. MAXWELL: "The same is true of the American Express Company?"

Mr. HILL (counsel for defendant, American Express Co.): "Yes sir."

Mr. MAXWELL: "And you refused to ship, absolutely refused to ship?"

63 Mr. HILL: "Yes sir."

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 8th day of February, 1915.

FRED O. BLUE,  
*Counsel for the State of West Virginia.*

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 10th day of February, 1915.

BENJ. A. RICHMOND,  
*Counsel for The Western Maryland Railway Company.*

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 11th day of February, 1915.

JOHN PHILIP HILL,  
*Counsel for American Express Company.*

Approved Feb. 11", 1915.

JOHN C. ROSE,  
*U. S. District Judge.*

64

*Opinion of the Court.*

Filed December 18th, 1914.

In the District Court of the United States for the District of Maryland.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a Corporation,

vs.

THE AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed Under the Laws of the State of New York.

ROSE, *District Judge.*

For the reasons stated in the opinion filed in the case of The James Clark Distilling Company of Cumberland, Maryland, a corporation, vs. The Western Maryland Railway Company, a corporation, the plaintiff may present draft of decree for an injunction to the effect therein indicated.

65

*Opinion of the Court.*

Filed December 18, 1914, in the case of

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a  
Corporation,

versus

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

In the District Court of the United States for the District of  
Maryland.THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a  
Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

ROSE, *District Judge*:

Both the plaintiff and the defendant are Maryland corporations. The interposition of this court is invoked for the protection of rights said to be given by the Constitution and laws of the United States. The defendant operates a railroad between Cumberland, Maryland, and various stations in the counties of Mineral, Grant and Tucker, West Virginia, among them being the town of Parsons. On July 1, 1914 there went into effect an act of the legislature of the latter State commonly known as the Yost law. It prohibits, except for medicinal, pharmaceutical, scientific, mechanical or sacramental purposes, the manufacture, sale or offer for sale of intoxicants and the soliciting or receiving of orders for them. It contains many provisions intended to make evasion difficult and dangerous. Penalties are imposed on those who by themselves or in association with others maintain any club-house or other place in which liquor is received or kept for the purpose of use, gift, barter or sale as a beverage, or for distribution or division among the members of any club or association. Section 8 provides in part that—

66 "If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise \* \* \* of the sale or keeping for sale of liquors, or shall circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, shall be guilty of a misdemeanor."

Another section requires common carriers to keep books in which shall be entered the name of every person to whom liquors are shipped and the amount and kind thereof, together with the date of delivery and by and to whom delivered. Every consignee must in person sign his name to such record.

Within a few weeks after the act went into effect the State thought it had reason to believe that systematic attempts to evade its provisions were being made by various residents of the counties named. It accordingly, as authorized by law, sought the aid of its Circuit Court having jurisdiction in them. It filed a bill against the company, which is the defendant in this cause. It alleged various facts which strongly tended to show that the defendant was delivering great quantities of liquor to many different persons in the town of Thomas and its neighborhood, and that a number of these shipments were of such quantities as to make it highly improbable that they could have been intended solely for the personal use of the consignees. It charged that much of this liquor had been shipped to boarding bosses and other persons to be, in violation of law, by them distributed to their boarders or associates. It said that the defendant was accepting shipments and making deliveries of liquors without exercising due care to ascertain that they were not intended to be used in violation of its laws. In accordance with the prayer of this bill an exparte injunction was issued which, among other things, enjoined the defendant from accept-

67 ing for transportation or delivery to anyone in the three counties in question any liquors unless it had first ascertained "by acting in good faith with due diligence and caution, that such liquors were ordered by the consignees for their lawful personal use without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant to the consignees for their lawful personal use without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said State". It was further enjoined from delivering to any person in the counties named any liquors procured by the consignee, by him and those associated with him "to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him, at any place which is kept or maintained by himself or by associating with others, or which he by himself or by association with others in any manner aids, assists or abets in keeping or maintaining". The decree, moreover, prohibited delivery to any person "unless the consignee signs the defendant's liquor record in his own proper person and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said State of West Virginia in violation of any law thereof."

So soon as this injunction was served upon the defendant it determined to refuse, and thereafter did refuse, to receive any shipments of liquor for transportation to any station in those counties. It says that if it attempted, before accepting such shipments or before making such deliveries, to obtain the information  
68 required by the order of the West Virginia court, it would be compelled to employ an army of detectives and inves-

tigators which would cost it far more than the gross freight it would receive for the transportation of the merchandise in question.

The plaintiff is a liquor dealer in Cumberland. It has a large and profitable trade in the portion of West Virginia included within those counties. It is also one of the concerns which the State of West Virginia in its bill of complaint in its own court specially mentioned as shipping liquors in large quantities to the town of Thomas and its neighborhood. Both before and after the going into effect of the Yost act it has through the mails systematically distributed price-lists and solicited orders from residents of that part of the State. With its price-lists and soliciting circulars it sent out order blanks to be filled up and signed by prospective purchasers. In these blanks there is a clause stating that the liquor is intended for the personal use of the individual giving the order.

In August 1914 one Floyd Rosier, a resident of the town of Parsons, by one of these order blanks directed the shipment to him by the plaintiff of four quarts of alcohol and sent a post-office money order for Four Dollars in payment therefor. The plaintiff packed the goods for shipment and tendered them to the defendant for transportation. In accordance with the determination, at which, as before stated, it had arrived, the defendant refused to receive or transport the package and announced that it would refuse to accept any intoxicants for delivery in the territory in which the injunction was operative. The plaintiff thereupon instituted these proceedings. It seeks a mandatory injunction to compel the defendant to transport all liquors ordered, without plaintiff's so-

69 licitation, by Rosier and other customers for their own personal use. At its request, and with the consent of all parties, the State of West Virginia has been made a party to the suit.

Only two questions in this case interest the defendant. It fears that it may be commanded to do something for the doing of which the State court will punish it, and it objects to spending a large sum of money to keep other people from evading the liquor laws of West Virginia.

The voluntary appearance of the State disposes of the former. It was the plaintiff in its own courts. It alone can complain of any disobedience of the decree there passed. It has come into this proceeding and will be bound by whatever is properly done herein.

The expenses to which the defendant may lawfully be put in connection with the shipment and delivery of intoxicants in West Virginia depends upon the degree of care which it may be required to exercise to prevent others using its facilities to break the laws of the State. The controversy between the plaintiff and the State is more far reaching and will be first passed upon.

At the hearing the counsel for the State argued, first, that any shipment into West Virginia by a seller to a buyer of intoxicants was prohibited. Second, that even if that was not so any such shipment was forbidden if the seller had by mail or otherwise solicited the order for it. The first contention was based upon the construction which the State put upon a clause of section 3 of the act, which reads:



"In case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

70 The sale of intoxicants in West Virginia is prohibited.

Liquor which a resident of West Virginia orders from out of the State is usually delivered to him by a common carrier. If he has bought it the State says that the law declares that the sale has taken place in the county in which he lives.

Such an interpretation of the statute cannot be accepted. The provision quoted does not make illegal anything not otherwise forbidden. All that it does or was intended to do was to make certain the county in which those who had offended against its other provisions should be prosecuted. The State could not forbid the sale of liquors in Maryland, nor could it say that what by the general law was a completed sale in Maryland should be held to have been made in West Virginia.

American Express Co. v. Iowa, 196 U. S., 133.

If it had wished to keep citizens of West Virginia from obtaining liquor even for their own personal use from outside the State, and had the constitutional right to do so, it might have made it an offense for anyone to order them or to receive or have them. There is nothing in the act, however, to indicate that the State had any objection to anyone obtaining liquor for his own personal use provided he can do so otherwise, than by, within the State, buying or making it.

It follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by anyone interested therein to be received, possessed or used in violation of any law of that State.

Does the fact that such order has been solicited through the mails by a non-resident dealer in liquors make the transaction, which would otherwise have been lawful, illegal? One may solicit in writing as well as by word of mouth. Such a solicitation is made at the place at which in pursuance of the intent of the person making it the written communication is delivered to the person solicited.

United States v. Thayer, 209 U. S., 39.

That the letter is mailed in another State from that at which it is to be delivered does not necessarily prevent the latter state from punishing the sender if it can catch him.

In re Palliser, 136 U. S., 257.

It may be that the right to inflict punishment in such cases may be exercised only when the letter is sent in furtherance of something which the common moral sense of mankind regards as criminal, and does not exist when the thing, aided by the letter, would be in itself indifferent had it not been made criminal by local legislation.

Adams v. The People, 1 N. Y., 175.

Into these niceties it is unnecessary to go. Judge Keller has held that the Yost act reasonably construed does not attempt to prohibit the solicitation of liquor orders by means of communications mailed from without the State.

West Virginia v. Adams Express Co., et al., (as yet unreported.)

It seems only fair to presume that if the legislature had wished to deal with that phase of the problem it would have used language which would have made its purpose plain. I therefore agree that the West Virginia law has not attempted to prohibit such method of soliciting. Whether it has a constitutional right to do so if it chooses need not be here decided and I intimate no opinion, as to it.

The Federal courts are, of course, bound by the construction which those of the State put upon its own statutes. I do not understand, however, that such rule requires national tribunals to accept the issue by a State court of first instance of an injunction upon an ex parte application as an authoritative construction of the applicable State legislation.

72 The defendant in this case makes no objection to the requirement that it shall keep certain kinds of delivery books. It is consequently unnecessary to inquire whether the somewhat narrow construction put upon the Webb-Kenyon act by a number of State courts of last resort, in such cases as *Adams Express Co. v. Commonwealth*, 157 S. W., 908, *Palmer v. Southern Express Co.*, 165 S. W., 236, *Van Winkle v. State*, 91 Atl., 385, or that in effect given to it by Judge Bean in *United States v. Oregon Washington Rail Navigation Co.*, 210 Fed., 378, is the sounder interpretation of the intention of the Congress which passed it. It would be even more beside the mark to pass upon the soundness of plaintiff's contention that a State cannot validly prohibit the possession by an individual of intoxicants for his own personal use. A number of courts of high rank have so held.

*State v. Gilman*, 33 W. Va., 146;

*Commonwealth v. Campbell*, 133 Ky., 50;

*Eidge v. City of Bessemer*, 164 Ala., 599.

On the other hand, it is clearly settled that he may be constitutionally prohibited from either buying or making it within the State. As every State in the Union has the like right, and as it is at least possible that Congress may validly prohibit its importation from abroad, the right, if it exists, may be lawfully made almost impossible of exercise.

In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the State. It has no right to accept for shipment, or to

73 deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that State. It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the State law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agents and employees who handle such shipments for it must keep their eyes open and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law.

A decree may be drawn in accordance with the conclusions herein stated.

74

*Decree.*

Filed December 24, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md.,  
a Corporation,

vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business  
in the State of West Virginia.

This cause came on to be heard at the September Term of this court, held in Cumberland, Maryland, upon the bill of complaint, the answer of the defendant, The American Express Company, an association doing business in the State of West Virginia, and the petition of the State of West Virginia, a body politic and a sovereign State, to be made a party defendant herein, and the order of this court making the said State of West Virginia a party defendant, and the testimony and proofs in the case, and was argued by counsel.

It is thereupon, upon consideration of the same, for reasons stated in written opinion, which opinion is marked filed and made a part of the record, this 24th day of December, 1914, ordered, adjudged and decreed by the United States District Court for the District of Maryland, that The American Express Company, defendant herein, its agents, servants, employees and officers, and each of them, be and they are hereby commanded and enjoined to cease refusing to accept for transportation over its express line in due course of business from Cumberland, Maryland, to points of delivery in

75 the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff herein, residing and being in said Counties of West Virginia, for their

own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually enjoined and commanded to accept from the plaintiff as aforesaid all such liquors presented to them by the plaintiff for shipment over its said express line from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its express line in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and delivery of merchandise, and for the keeping of a record of the same, as required by the law of the State of West Virginia; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its express line at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof.

Provided, however, that before the said defendant, The American Express Company, its servants, agents, employees, and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees, and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things shall carefully scrutinize said shipments of liquor and exercise their common sense to prevent said express line and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia; and in case the defendant, its agents, servants, employees, and officers shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees, and officers shall refuse to accept or deliver the same, as the case may be.

JOHN C. ROSE,  
*District Judge.*

*Perpetual Injunction.*

Issued December 24, 1914.

THE UNITED STATES OF AMERICA,  
*District of Maryland, To-wit:*

The President of the United States of America to American Express Company, a Joint Stock Association formed under the laws of the State of New York:

Whereas, The James Clark Distilling Company, a corporation, duly organized and existing under the laws of the State of Maryland, and a citizen of said State and of the United States, filed its bill of complaint in the District Court of the United States for the District of Maryland, at Cumberland, Maryland, on the 24th day of August, 1914, praying among other things for an injunction perpetually commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them to cease refusing to accept for transportation over its express line in due course of business, from Cumberland, to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all liquors ordered by Floyd Rosier or other customers of The James Clark Distilling Company, for their own personal use, and without solicitation on the part of The James Clark Distilling —, as more particularly set forth in said bill of complaint;

And whereas, the said District Court hath, this 24th day of December, 1914, granted an injunction commanding and enjoining you as hereinafter set forth,

You, your agents, servants, employees, and officers and each of them are therefore commanded and enjoined to cease refusing to accept for transportation over its express line in due course of business from Cumberland, Maryland, to points of delivery in the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff herein, residing and being in said Counties of West Virginia, for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees, and officers, be and they are hereby perpetually enjoined and commanded to accept from the plaintiff as aforesaid all such liquors presented to them by the plaintiff for shipment over its said express line from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its express line in

said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and delivery of merchandise, and for the keeping of a record of the same, as required by the law of the State of West Virginia; and said defendant, its agents, servants, employees, and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its express line at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof; Provided, however, that before the said defendant The American

Express Company, its servants, agents, employees, and of-

79 ficers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties, in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees, and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things shall carefully scrutinize said shipments of liquor and exercise their common sense to prevent said express line and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia, and in case the defendant, its agents, servants, employees, and officers shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees, and officers shall refuse to accept or deliver the same, as the case may be, under the pains and penalties that may fall thereon. Hereof fail not at your peril.

80 Witness the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, the 24th day of December, 1914.

Issued the 24th day of December, 1914.

[SEAL OF COURT.]

ARTHUR L. SPAMER,  
*Clerk of our said District Court.*



81 *Order of Court Directing a Re-argument.*

Filed January 15, 1915.

In the District Court of the United States for the District of  
Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a  
Corporation,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed  
under the Laws of the State of New York.

The court of its own motion having come to the conclusion that there is probable error in the decree entered in the above entitled cause on the 24th day of December, 1914, hereby, this 15th day of January, 1915, orders a re-argument of said matter to be held on Wednesday, January 20th, 1915, at 10 o'clock A. M. in the United States District Court Room, at Baltimore, Maryland.

JOHN C. ROSE,  
U. S. District Judge.

## 82

*Final Decree.*

Filed January 23, 1915.

District Court of the United States, District of Maryland, at Cumberland, Md.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,  
Complainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association, Formed  
under the Laws of the State of New York, Defendant.

Decree.

This cause came on to be heard in pursuance of the order for re-argument entered on January 15th, 1915, and all parties being present in open court by their counsel, counsel of complainant objected to the vacation and setting aside of the decree of December 24th, 1914, on the grounds that the constitution and laws of West Virginia as applied to the interstate commerce transactions disclosed in the pleadings and evidence are repugnant to the commerce clause of the Constitution of the United States and the Fourteenth Amendment thereof; and that if the application of said

constitution and laws of West Virginia to such interstate commerce is authorized by the Act of Congress of March 1st, 1913, entitled, "An Act divesting intoxicating liquors of their interstate character in certain cases", that said Act of Congress is repugnant to said commerce clause and the Fifth Amendment of the Constitution of the United States.

83 On consideration whereof it appearing to the court that its decision and decree entered herein on December 24th, 1914, is in conflict with the decision of the United States Circuit Court of Appeals, for the Fourth Circuit, in the case of State of West Virginia, appellant, vs. Adams Express Company, appellee, No. 1325 in said court, a copy of the opinion of the Court of Appeals being filed herewith, it is now ordered that said decree entered herein on December 24th, 1914, be and the same is hereby vacated and set aside. And thereupon this court, in conformity with the said decision of the United States Circuit Court of Appeals for the Fourth Circuit, orders and decrees that the bill of complaint be and the same is hereby dismissed at the costs of the plaintiff. Thereupon came the plaintiff and presented its petition for an appeal from this decree to the Supreme Court of the United States, and its assignment of errors, and said appeal is allowed in open court.

JOHN C. ROSE,  
*District Judge.*

84 United States Circuit Court of Appeals, Fourth Circuit.

No. 1325.

STATE OF WEST VIRGINIA, Appellant,  
versus

ADAMS EXPRESS COMPANY, Association, Appellee.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston.

[Argued Dec. 9, 1914. Decided Jan. 13, 1915.]

Before Knapp and Woods, Circuit Judges, and Waddill, District Judge.

Fred O. Blue and Wayne B. Wheeler, for Appellant, and George E. Price and Joseph S. Graydon (Lawrence Maxwell on brief), for Appellee.

WOODS, *Circuit Judge*:

84a The State of West Virginia brought this suit in the Circuit Court of Kanawha County against the Adams Express Company, R. H. Clendenin and Edward Beigel, alleging: that Beigel, a resident of Cincinnati, Ohio, sent through the mails to

many persons in West Virginia curcular letters soliciting the purchase of intoxicating liquors, contrary to the law of the State; that Clendenin, induced by the solicitation, ordered from Beigel one-fourth of a barrel of beer which was carried by the Adams Express Company from Cincinnati to Charleston, West Virginia, and was there held by the carrier ready for delivery when the bill was filed; and that Beigel intends to continue to ship into West Virginia by the defendant Express Company beer on orders so solicited. The breach of duty to the State alleged against the Express Company was its failure to use due diligence to ascertain before carrying the beer whether the contract for its sale was made in pursuance of an illegal scheme of solicitation, and that by delivering the beer, as it intended, it would aid Beigel in his unlawful attempt to make sales in West Virginia, inasmuch as the statute makes the place of delivery the place of sale. Beigel was not served. The relief asked, with which we are now concerned, is that the State

"Be awarded an injunction against the said defendant, the Adams Express Company, restraining it, its agents, employes and representatives from delivering to the defendant R. H. Clendenin the consignment aforesaid of one-fourth barrel of draught beer; and that defendant, the Adams Express Company, its agents, employes and representatives, be enjoined from delivering to the defendant, or to any other person, any shipment of liquors manufactured by the Pabst Brewing Company and handled by said defendant Beigel, or any of his agents, representatives, or employes at any place where said defendant Express Company operates in the State of West Virginia, within the jurisdiction of the court, unless the consignee of any such liquors can show to the satisfaction of the defendant Express Company, its agents representatives and employes, that he without

84b solicitation from said Beigel, or any of his agents, representatives, or employes ordered the consignment of liquors for his own personal lawful use without having received from said Beigel, or any of his agents, representatives or employees, advertisements or letters soliciting orders for liquors, or price lists or order blanks advertising or soliciting from the consignee orders for liquors."

A preliminary order of injunction was made by the State Court, but upon removal of the cause to the District Court for the Southern District the District Judge, on motion of the Adams Express Company, dissolved the injunction and dismissed the bill, holding that the State law could not prevent solicitation through the United States mails for the sale of liquor, and that there is nothing in the Wilson Act or the Webb-Kenyon Act which authorizes the State to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed dealer without the State.

The appeal requires a consideration of the scope and effect of the West Virginia Constitutional and Statute Law and the effect upon it of the Act of Congress of 1 March, 1913, known as the Webb-Kenyon Act.

1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in

prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

We are not concerned in this case with the question whether the State Legislature or the State Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another State and bring them into the State of West Virginia for his own consumption; but with the very different question whether the State may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the State by the common carrier of liquor so to be delivered contrary to the law of the State. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the State and deliveries by common carriers, by which liquor dealers outside of prohibition States were enabled to thwart the efforts of State governments to save the people of the State from the liquor evil, have been forbidden by State legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the Act of Congress known as the Webb-Kenyon Act.

The amendment to the Constitution of the State of West Virginia, known as section 46, ratified in November, 1912, prohibits "the manufacture, sale and keeping for sale" of intoxicating liquors, with exceptions not material here; and it provides that "the Legislature shall, without delay enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section." On 11 February, 1913, the Legislature enacted a statute to take effect 1 July, 1914, which in section three contained this provision:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer, or expose for sale; or solicit or receive orders for any liquors or absinthe or any liquors compounded with absinthe, he shall be deemed guilty of a misdemeanor; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale, said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the

sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

2. At the argument it seemed to be conceded that State legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the State legislative power. The power of the State to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in *Sinnot vs. Davenport*, 63 U. S. 227; *Delamater vs. South Dakota*, 205 U. S. 93, and innumerable other federal and State decisions. "The internal commerce of a State—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government." *Sands vs. Manistee River Improvement Company*, 123 U. S. 288; *Hart vs. State*, 87 Miss. 171, 39 So. 523, 112 84e Am. St. 437. This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in *State vs. Herring*, 145 N. C., 418, 58 S. E. 1007, 122 Amer. St. 461, and *State vs. Patterson*, 134 N. C. 612, 47 S. E. 808.

3. There is nothing in the amendment of the State Constitution that takes away by implication this power of the legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits "the manufacture, sale and keeping for sale" of liquors. But it does not indicate a purpose to deprive the legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the State on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the State as a permanent State policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the constitution as the permanent law of the State. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in *State vs. Hooker (Okla.)*, 98 Pac. 964.

4. The point is earnestly pressed that even if it be true  
84f that under the statute in West Virginia delivery in any county of the State is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the State

in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person "who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing, or exposing for sale as the case may be" and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the State that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who either from carelessness or design habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that

habitual aid extended to others violating the law shall not be  
 84g subject to injunction as a nuisance. If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in *In Re Debs*, 158 U. S. 564, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration, is thus stated in the case cited:

"Every government, entrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing to one resulting in injury to the general welfare is often of itself sufficient to give it standing in court."

5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor.

6. The right of the State to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another



State, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for  
84*h* Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

7. It makes no difference that the United States Mail was used for the solicitation. The Federal Government does not protect those who use its mails to thwart the police regulations of a State made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. In *Re Polliser*, 136 U. S. 257; *U. S. vs. Shayer*, 209 U. S. 39; *Hayner vs. State*, 83 Ohio 178; *State vs. Morrow*, 40 S. C. 221, 18 S. E. 853.

8. The express company further contends that the State is not entitled to an injunction against the delivery in West Virginia of the liquor which it has transported for Biegel, or against its intended transportation and delivery of liquor which Biegel intends to consign to other persons in West Virginia, on the assertion that these transactions are under Federal protection as interstate commerce and beyond the reach of the legislature of the State. This proposition is admitted to be sound, unless the Webb-Kenyon Act removes the protection, and subjects the delivery of liquor in West Virginia to the inhibition of the State legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia.

9. The position is untenable that the Webb-Kenyon Act has no application, and therefore is without efficacy to extend the  
84*i* scope of the State legislation to interstate dealings in liquor because that statute was not enacted until 1 March, 1913, after the West Virginia statute had been passed on 11 February, 1913. The point has not been decided by the Supreme Court of West Virginia. There is a dictum in *State vs. Miller*, 63 West Virginia 436, in favor of the position of the express company, where the question was the application of the Wilson Act to West Virginia legislation. But as the court expressly stated the point was not and could not be involved since the State statute under consideration had been re-enacted after the passage of the Wilson Act. But even if this had been a direct decision we do not think it could prevail against the contrary view of the Supreme Court of the United States, for we venture to think the question is not one of the construction of a State statute, but of the force and effect of a Federal statute in a State law and on such an issue the decisions of the Supreme Court of the United States are controlling. That court thus determined

the matter *In Re Rahrer*, 140 U. S. 545; in passing on the effect of the Wilson Bill:

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

This principle has been reaffirmed in *Butler vs. Gorely*, 146 U. S. 303, *Ernest vs. Missouri*, 156 U. S. 296; *Central P. C. R. Co. vs. Nevada*, 162 U. S. 512; *Silt vs. Westerberg*, 211 U. S. 31.

This is the Webb-Kenyon Statute including the title:

84j An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

10. The terms of the statute are so plain and ambiguous that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the State law only after arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee "imported liquor fell within the category of domestic articles of a similar nature." *In Re Rahrer*, *Supra*.

The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one State were protected in impairing or defeating the efforts of another State to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one State into another not only when it is intended to be sold in violation of any law of such State, but when it is to be received or pos-

84k sessed or in any manner used in violation of the State law.

This is a direct recognition of the right of the State to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor that "the sale thereof

shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee," and it expressly forbids a sale within the State. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of State prohibition laws which it was the manifest intention of the Congress to remove. The Supreme Court of Kentucky has held that although the State statute expressly prohibits the delivery of liquor by a common carrier and such prohibition is valid as to all intrastate shipments, yet the Webb-Kenyon Act does not permit such prohibition to extend to intrastate commerce where the liquor is for personal use. *Adams Express Company vs. Commonwealth*, 154 Ky. 426, 157 S. W. 908, 47 L. R. A. (N. S.) 342.

11. All other decisions we think are in complete accord with the conclusion we have reached, namely that the Webb-Kenyon Act puts without the protection of interstate commerce liquor shipped into the State to be sold, received, or used, when sale, receipt or use is forbidden by the State law. *Palmer vs. Express Co.*, 84 L. (Tenn.) 165 S. W. 236; *State vs. Doe* (Kansas), 139 Pac. 1169; *State vs. Express Co.* (Ind.), 145 N. W. 451; *United States vs. Oregon-Washington R. & N. Co.*, 210 Fed. 378; *Van Winkle vs. State*, (Del.) 91 Atl. 385; *Ex Parte Peede*, (Texas), 170 S. W., 749; *Southern Express Company vs. State* (Ala.), 66 So. 115; *Amer. Express Co. vs. Beer* (Miss.) 65 So. 575. The general trend of Congressional debate on the bill attributed the same meaning to the act, as did also the opinion of the Attorney General given to the President on the question of its constitutionality. Since delivery by one party is necessary to the receipt by another, if receipt be forbidden by a statute, deliveries might well be enjoined as acts promoting illegal receiving of liquor. Under the West Virginia Statute they are subject of injunction as sales within the State.

12. The constitutionality of the Webb-Kenyon Statute is attacked on the ground that it is an attempt by Congress to confer on State Legislatures the power to regulate interstate commerce. This we think is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex Parte Rahrer*, *Supra*; *Lottery Case*, 188 U. S. 321; *Hoke vs. U. S.*, 227 U. S. 308; *Hipolite Egg Co. vs. United States*, 220 U. S. 45. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules or admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

13. The following language of Mr. Justice White in *Vance vs.*

Vandercook, 170 U. S. 438, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited 84*m* elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a prohibition State.

"On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina and finds its support in the Constitution of the United States."

It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the States, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular States when such transportation would be especially injurious to the public interest in that, when they reach the State, they will derange and make inefficacious the police measures for the control of intoxicants which the State has seen fit to adopt. The

84*n* courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the States of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.

We think that the State of West Virginia is entitled to the order of injunction prayed for and it will be so ordered.

Reversed.

85 *Petition for Appeal and Assignment of Errors.*

Filed January 23, 1915.

District Court of the United States, District of Maryland, at Cum-  
land, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-  
plainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed  
Under the Laws of the State of New York, Defendant.*Petition for Appeal and Assignment of Errors.*

Complainant prays an appeal from the decree entered herein on January 23, 1915, to the Supreme Court of the United States and assigns as error that this court erred;

1. In holding that the constitution and laws of West Virginia make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by the shipper to the consignee in such other state.

2. In holding that the constitution and laws of West Virginia prohibit a liquor dealer in a state other than West Virginia from advertising the sale of liquors in such other State to be transported and delivered in pursuance of such sale to the persons to whom such advertisements may come for their personal use; such advertising being carried on by means of the United States mail.

86 3. In holding that the constitution and laws of West Virginia, if they make the place of delivery in West Virginia the place of sale, where a shipment of intoxicating liquors is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by mail at the point of origin of said shipment in said other state, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

4. In holding that the constitution and laws of West Virginia, if they prohibit a dealer in a State other than West Virginia from advertising the sale of liquors in said other State to be transported and delivered to the persons to whom such advertisements may come for their personal use; such advertisements being carried on by means of the United States mail, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

5. In holding that the Act of Congress of March 1, 1913, entitled;

"An Act divesting intoxicating liquors of their interstate character in certain cases," authorized the State of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for personal use of the consignee in West Virginia.

6. In holding that the Act of Congress of March 1, 1913, entitled; "An Act divesting intoxicating liquors of their interstate character in certain cases," if it authorized the State of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for the personal use of the consignees in West Virginia is not repugnant to the Commerce Clause of the Constitution of the United States and the 5th Amendment thereof.

87 7. In vacating its decree entered December 24, 1914.

8. In dismissing the bill of complaint.

LAWRENCE MAXWELL,

WALTER C. CAPPER,

*Solicitors for Plaintiff.*

88 *Order of Court Prescribing Amount of Bond to be Given on Appeal.*

Filed January 23, 1915.

In the District Court of the United States for the District of Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md.,  
a Corporation.

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed  
Under the Laws of the State of New York, and the State of West  
Virginia, a Body Politic and a Sovereign State.

Ordered, by the District Court of the United States for the District of Maryland, this 23rd day of January, 1915, that The James Clark Distilling Company, a corporation, plaintiff in the above entitled cause, give an appeal bond in the penalty of Two Hundred Dollars (\$200.00) for costs on its appeal to the Supreme Court of the United States, from the decree entered this day in said cause.

JAHN C. ROSE,

*U. S. District Judge.*

89 *Appeal Bond.*

Filed January 26th, 1915.

Know all men by these Presents, That we, The James Clark Distilling Company of Cumberland, Md., as principal, and William A. Buchholtz of Cumberland, Md., as surety, are held and firmly



bound unto The American Express Company and the State of West Virginia in the full and just sum of Two hundred dollars, to be paid to the said American Express Company and the State of West Virginia their certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 26th day of January, in the year of our Lord one thousand nine and fifteen.

Whereas, lately at a District Court of the United States for the District of Maryland in a suit depending in said Court, between the James Clark Distilling Company of Cumberland, Md.; a corporation, plaintiff and American Express Company and the State of West Virginia, defendants a decree was rendered against the said The James Clark Distilling Company, of Cumberland, Md., and the said The James Clark Distilling Company, of Cumberland, Md., having been allowed an appeal from said decree to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said American Express Company and the State of West Virginia citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said the James Clark Distilling Company of Cumberland, Md.,  
90 shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the James Clark Distilling Co. of Cumberland, Md.]

THE JAMES CLARK DISTILLING COM-  
PANY OF CUMBERLAND, MD.,

By JNO. KEATING, *Its Vice President.*

WILLIAM A. BUCHHOLTZ,

[SEAL.]

Sealed and delivered in presence of

JNO. KEATING,

*Secretary.*

WALTER C. CAPPER.

Approved by

JOHN C. ROSE,

*U. S. District Judge for the District of Maryland.*

91 UNITED STATES OF AMERICA, ss:

To the American Express Company, and the State of West Virginia,  
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland, entered on the 23rd day of January, 1915, in a cause pending

therein wherein The James Clark Distilling Company, a corporation, is plaintiff, and you are defendant to show cause, if any there be, why the decree rendered against the said plaintiff as in the said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the said District Court of the United States, this twenty-third day of January, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court Maryland.]

JOHN C. ROSE,  
*Judge of the District Court of the United  
States for the District of Maryland.*

Attest:

ARTHUR L. SPAMER,  
*Clerk District Court of the United  
States for the District of Maryland.*

Service of the within Citation acknowledged this 28th day of January, 1915.

THE STATE OF WEST VIRGINIA,  
By FRED O. BLUE, *Its Attorney.*  
THE AMERICAN EXPRESS COMPANY,  
By JOHN PHILIP HILL, *Its Attorney.*

92 *Plaintiff's Præcipe for Record on Appeal.*

Filed February 11th, 1915.

District Court of the United States, District of Maryland, at Cumberland, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Complainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint-Stock Association Formed under the Laws of the State of New York, Defendant.

*Præcipe.*

To the Clerk:

Please incorporate into the transcript on appeal, the following portions of the record:

1. Bill of Complaint.
2. Answer of American Express Company.
3. Respondent's Exhibit No. 1.
4. Petition of State of West Virginia to be made a party defendant and Order of Court permitting State of West Virginia to be

made a party defendant unless cause to the contrary be shown as therein set forth.

5. Exhibits Nos. 1 and 2 of the State of West Virginia.

6. Order of Court permitting the State of West Virginia to be made a party defendant.

7. Condensed Statement of Testimony as prepared by Appellants, agreed to by appellees and approved by the Court.

8. Opinion of the Court.

9. Decree.

10. Injunction.

93 11. Order of Court ordering a re-argument of this case.

12. Decree dismissing Bill of Complaint.

12½. Certified copy of the opinion of the United States Circuit Court of Appeals for the Four- Circuit in the State of West Virginia, Appellant, vs. Adams Express Company, Appellee, No. 1325.

13. Petition for Appeal.

14. Assignment of Errors.

15. Order prescribing bond to be given on appeal.

16. Appeal Bond.

17. Citation.

18. Order to transmit Record.

19. Clerk's certificate.

LAWRENCE MAXWELL,  
WALTER C. CAPPER,  
*Attorneys for Plaintiff.*

Service of a copy of the foregoing præcipe acknowledged this 8th day of February, 1915.

FRED O. BLUE,  
*Counsel for the State of West Virginia.*

Service of a copy of the foregoing præcipe acknowledged this 10th day of February, 1915.

BENJ. A. RICHMOND,  
*Counsel for Defendant, The  
Western Maryland Railway Co.*

Service of a copy of the foregoing præcipe acknowledged this 11th day of February, 1915.

JOHN PHILIP HILL,  
*Counsel for Defendant, The  
American Express Company.*

94

*Order to Transmit Record.*

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, *Clerk.*

*Clerk's Certificate.*

UNITED STATES OF AMERICA,  
*District of Maryland, To-wit:*

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 25th day of February, 1915.

[Seal United States District Court Maryland.]

ARTHUR L. SPAMER, *Clerk.*

95 In the District Court of the United States, for the District of Maryland.

No. —. Equity.

JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a Corporation,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association.

To the Honorable John C. Rose, Judge of said Court:

The petition of the James Clark Distilling Company in the above entitled cause, respectfully shows:

That this Honorable Court passed a final decree in the above cause on the 23d day of January, 1915, and the plaintiff was allowed an appeal from said decree to the Supreme Court of the United States, provided the record was made up and filed in the Supreme Court of the United States within thirty days from said 23d day of January, 1914.

Your petitioner now says that ever since said 23d day of January, 1915, its attorneys have been constantly engaged in having its appeal in this case perfected, but that on account of the fact that counsel engaged in said case reside a great distance apart, your petitioner's attorneys have been delayed in effecting an agreement among said attorneys as to what should constitute the record, and as to the narrative form to which the testimony should be reduced; that all of said matters have now been agreed upon by counsel, and the Clerk of this Court is engaged in perfecting the transcript in said case, but your petitioner is informed that said Clerk may be unable to have the transcript perfected in time to have the same filed in the Supreme Court of the United States on or before the return day, to-wit the 23d day of February, 1915, and your petitioner therefore respectfully prays the Court to pass an order hereon, extending the time for making up the said record and filing the same

96 with the Clerk of the Supreme Court of the United States, for a period of twenty days from the said 23d day of February, 1915.

And as in duty bound, &c.

LAWRENCE MAXWELL,  
WALTER C. CAPPER,

*Attorneys for the James Clark Distilling Company.*

Upon the foregoing petition it is ordered this 18 day of February, 1915, by the District Court of the United States, for the District of Maryland, that the time allowed the plaintiff in the foregoing cause for having the record of said case made up and filed with the Clerk of the Supreme Court of the United States, be and the same is hereby extended for a period of twenty days, from the 23d day of February, 1915.

JOHN C. ROSE,  
*District Judge.*

97 [Endorsed:] No. 3. Equity. In the District Court of the United States for the District of Maryland. The James Clark Distilling Company, of Cumberland, Md., a Corporation, vs. American Express Company, a Joint Stock Association. Petition and Order of Court. Mr. Clerk: Enter this Order on the minutes at Cumberland. John C. Rose, Judge. Walter C. Capper, Attorney and Counselor at Law. 10 Water Street, Cumberland, Md. Filed 18 February, 1915.

98 Supreme Court of the United States.

No. —.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Maryland, a Corporation, Appellant,

vs.

AMERICAN EXPRESS COMPANY, a Joint-Stock Association Formed under the Laws of the State of New York, and the State of West Virginia, Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

*Stipulation for Reducing the Printed Record.*

It is hereby stipulated that in printing the record on appeal, the Clerk may omit pages 41 to 44 inclusive of the typewritten transcript of record, being petitioner's Exhibit No. 2, the injunction order issued out of the Circuit Court of Tucker County, West Virginia, in State of West Virginia vs. American Express Company,

and being a duplication of defendant's Exhibit No. 1 appearing at page 16 of the typewritten record.

LAWRENCE MAXWELL,

*Attorney for Appellant.*

JOHN PHILIP HILL,

*Attorney for American Express Company, Appellee.*

FRED O. BLUE,

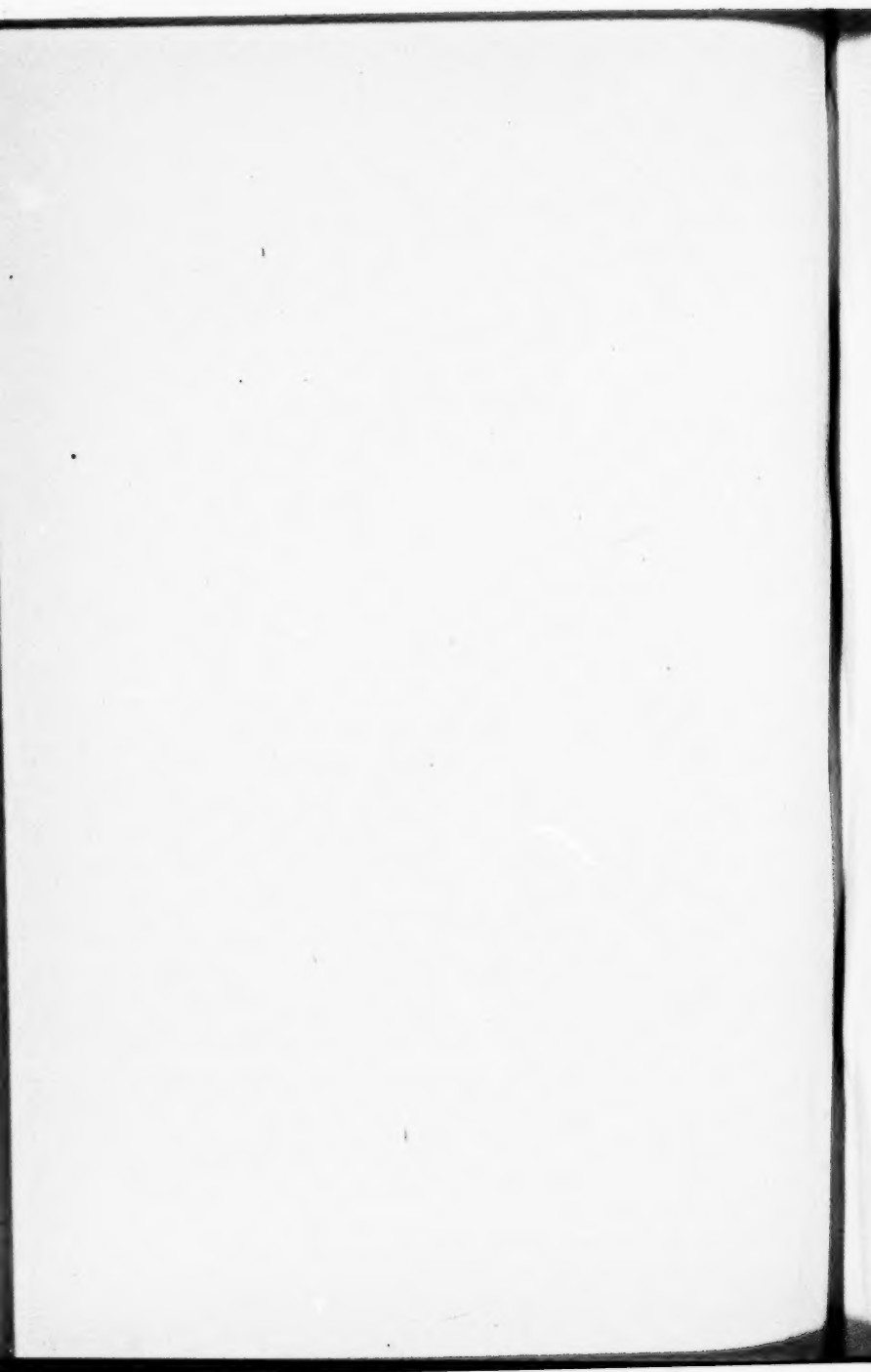
*Attorney for the State of West Virginia, Appellee.*

99 [Endorsed:] Supreme Court of the United States. No. 858/24,602. The James Clark Distilling Company, of Cumberland, Maryland, a corporation, Appellant, vs. The American Express Compny, a joint-stock association formed under the laws of the State of New York, and the State of West Virginia, Appellees. Stipulation for Reducing the Printed Record. Office of the Clerk. Received Mar. 15, 1915. Supreme Court U. S. Maxwell & Ramsey, Cincinnati, Ohio.

100 [Endorsed:] File No. 24,602. Supreme Court U. S. October term, 1914. Term No. 858. The James Clark Distilling Company, Appellant, vs. The American Express Company. Stipulation to omit parts of record in printing. Filed March 15, 1915.

[Endorsed on cover:] File No. 24,602. Maryland D. C. U. S. Term No. 858. The James Clark Distilling Company, appellant, vs. The American Express Company and The State of West Virginia. Filed March 5th, 1915. File No. 24,602.





APR 29 1915

JAMES D. MAHE

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**SUPREME COURT OF THE UNITED STATES.**

**October Term, 1914.**

**No. 857.**

**3 75**

The James Clark Distilling Company, Appellant,

vs.

The Western Maryland Railway Company, and the  
State of West Virginia.

**No.**

**3 76**

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and the State of  
West Virginia.

**Appeals from the District Court of the United States  
for the District of Maryland.**

**MOTION TO ADVANCE.**

Appellant moves the court to advance the above entitled cases to be heard in connection with Adams Express Company, Plaintiff in error, vs. Kentucky, No. 271, October Term, 1914. The three cases involve the question whether a state is authorized by the act of Congress of March 1, 1913, known as the Webb-Kenyon Law, to prohibit the interstate transportation of liquors for the personal use of the consignee.

An early decision of these cases is important for the following reasons.

The court below in each case on argument and consideration held that the interstate importation of

liquors for personal use into West Virginia was not prohibited and entered a decree to that effect. Thereafter on its own motion the court withdrew said decree and entered the final decree appealed from holding that such traffic was prohibited, in accordance with the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *State of West Virginia, appellant, vs. Adams Express Company*, 219 Fed. 794. In that case the Circuit Court of Appeals reversed a judgment of the District Court of the United States for the Western District of West Virginia holding that the traffic was not prohibited (*State of West Virginia vs. Adams Express Co.*, 219 Fed. 331). The decision of the United States Circuit Court of Appeals for the Fourth Circuit construing the Webb-Kenyon Law is directly contrary to the decision of the Court of Appeals of Kentucky in *Adams Express Company vs. Commonwealth*, 154 Ky. 426, which involved precisely the same facts as *Adams Express Company vs. Kentucky*, No. 271, October Term, 1914, in this court.

The construction of the Webb-Kenyon Law adopted by the United States Circuit Court of Appeals for the Fourth Circuit is to some extent approved by the Supreme Court of Mississippi (*American Express Co. vs. Beer*, 65 Sou. 575), the Court of General Sessions of Delaware (*State vs. Grier*, 88 Atl. 579), the District Court of the United States for the District of Oregon (*United States ex rel vs. Oregon-Washington Co.*, 210 Fed. 378). On the other hand the following courts in addition to the Court of Appeals of Kentucky hold that under the Webb-Kenyon Law a state is not authorized to prohibit the interstate transportation of liquors for personal use; Supreme Court of Delaware (*VanWinkle*

vs. State, 91 Atl. 385), Supreme Court of Tennessee (Palmer vs. Southern Express Co., 165 S. W. 236), Court of Criminal Appeals of Texas, by a divided court (Ex parte Peede, 170 S. W. 749), District Court of the United States for the District of Minnesota (Hamm Brewing Co. vs. Chicago, R. I. & P. Ry. Co., 215 Fed. 672), and others as noted in our brief.

As a result of this difference of opinion the mutual rights and duties of shippers, railroads and express companies are in doubt, and interstate traffic is disturbed in West Virginia and elsewhere. Interstate carriers in West Virginia are defendants in a number of injunction suits brought by the State in local courts and have suspended traffic by reason of temporary injunctions obtained ex parte. In Kentucky and elsewhere the interstate carriers and their agents have been subjected to numerous criminal prosecutions.

For these reasons we respectfully submit that the cases be advanced.

Lawrence Maxwell,  
Walter C. Capper,  
J. Philip Roman,  
Counsel for Appellant.

I acknowledge service of the foregoing motion and notice that it will be submitted on Thursday, April 29, 1915.

Fred O. Blue,  
Counsel for the State of West Virginia.

I consent to the granting of the foregoing motion.  
Benj. A. Richmond,  
Counsel for Western Maryland Railway Company.  
John Philip Hill,  
Counsel for American Express Company.



FILED

JUN 14 1915

JAMES D. MAHER  
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. [REDACTED]

3 [REDACTED] 75

The James Clark Distilling Company, Appellant,

vs.

The Western Maryland Railway Company and The  
State of West Virginia.

No. [REDACTED]

384 76

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and The State of  
West Virginia.

Appeals from the District Court of the United States  
for the District of Maryland.

ADDITIONAL LEGISLATION.

Since the submission and argument of these cases  
the Legislature of West Virginia on May 24, 1915, at  
an extraordinary session, passed the following statute  
which will take effect ninety days after its passage:

A Bill to amend chapter thirteen, acts of the legis-  
lature of one thousand nine hundred and thirteen, as  
amended by chapter seven, acts of the legislature of  
one thousand nine hundred and fifteen, regular session,

CLERK

JAMES D. MAHER

JUN 14 1915



relating to prohibiting the manufacture, sale and keeping for sale of intoxicating liquors and the enforcement of the amendment of section forty-six, article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, by enacting one additional section thereto, to be numbered section thirty-four, and to be part of said act.

Be it enacted by the Legislature of West Virginia:

That chapter thirteen, acts of the legislature of one thousand nine hundred and thirteen, as amended by chapter seven, of the acts of the legislature of one thousand nine hundred and fifteen, regular session, relating to prohibiting the manufacture, sale and keeping for sale, of intoxicating liquors and the enforcement of the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, be amended by enacting, as additional thereto, one section, as part thereof, numbered thirty-four, as herein set out.

“Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any per-

**ADVANCE COPY OF AN ACT**  
**OF THE**  
**LEGISLATURE OF WEST VIRGINIA**  
**SECOND EXTRAORDINARY SESSION, 1915.**

**Being Senate Bill No. 6, Originating in Select Committee**

[Passed May 24, 1915. In effect ninety days from passage. Approved by the Governor May 29, 1915.]

AN ACT to amend chapter thirteen, acts of the legislature of one thousand nine hundred and thirteen, as amended by chapter seven, acts of the legislature of one thousand nine hundred and fifteen, regular session, relating to prohibiting the manufacture, sale and keeping for sale of intoxicating liquors and the enforcement of the amendment of section forty-six, article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, by enacting one additional section thereto, to be numbered section thirty-four, and to be part of said act.

*Be it enacted by the Legislature of West Virginia:*

That chapter thirteen, acts of the legislature of one thousand nine hundred and thirteen, as amended by chapter seven, of the acts of the legislature of one thousand nine hundred and fifteen, regular session, relating to prohibiting the manufacture, sale and keeping for sale, of intoxicating liquors and the enforcement of the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, be amended by enacting, as additional thereto, one section, as part thereof, numbered thirty-four, as herein set out.

Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however*, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four.



# West Virginia Prohibition Law.

[Including Amendments Made by Legislature of 1915.]

AN ACT to prohibit the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except the manufacture, sale and keeping for sale for medicinal, pharmaceutical, mechanical, sacramental or scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes as regulated and provided for by this act; and to enforce the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve; and making the state tax commissioner *ex officio* state commissioner of prohibition, and defining his duties; and providing for the enforcement of this act and prescribing penalties for violations thereof.

*Be it enacted by the Legislature of West Virginia:*

Sec. 1. The word "liquors" as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word "liquors," as hereinafter used in this act.

Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors manufactured prior to July first, one thousand nine hundred and fourteen, and stored in United States bonded warehouses in the custody of the United States collector of internal revenue, and the said liquors when tax paid and in transit from such warehouses to points outside of this state.

Sec. 3. Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employee of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employee of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.

An indictment for any first offense under this section shall be sufficient if in the form or effect following:

State of West Virginia,

County of.....to-wit:

In the Circuit Court of.....County:

The grand jurors in and for the body of the said county of ....., upon their oaths do present that A. B., within one year next prior to the finding of this indictment, in the said county of ....., did unlawfully manufacture, sell, offer, keep, store and expose for sale and solicit and receive orders for liquors, and absinthe and drink compounded with absinthe, against the peace and dignity of the state.

Sec. 4. The provisions of this act shall not be construed to pre-

vent any one from manufacturing, for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal and scientific purposes, or of wine for sacramental purposes, by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. But no druggist shall sell any such grain alcohol except for medicinal, scientific, pharmaceutical and mechanical purposes, or wine for sacramental purposes, except as hereinafter provided, and the same shall not be sold by such druggist for medicinal purposes, except upon a written prescription of a physician of good standing in his profession and not of intemperate habits, or addicted to the use of any narcotic drug, prescribing the amount of alcohol, the disease or malady for which it is prescribed, and how it is to be used, the name of the person for whom prescribed, the number of previous prescriptions given by such physician to such person within the year next preceding the date of such prescription, and stating that the same is absolutely necessary for medicine, and not to be used as a beverage, and that such physician, at the time such prescription was given, made a personal examination of such person, and that such person is known to such physician to be of temperate habits and not addicted to the use of any narcotic drug, and only one sale shall be made upon such prescription, and such prescription shall be at all times kept on file by such druggist and open to the inspection of all state, county and municipal officers. It shall be the duty of such druggist to register in a book kept for that purpose all prescriptions from physicians mentioned in this section, stating the name of the party for whom prescribed, the date of the prescription, the name of the physician by whom the prescription is issued, the quantity of such alcohol and the use for which prescribed, and such record shall at all times be open to the same inspection as such prescriptions.



It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person, not a minor, and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage, or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit, and only in the county where the same is made, and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath.

If any druggist, owner of a drug store, registered pharmacist, clerk or employe shall upon such prescription or affidavit, or otherwise, knowingly sell or give any such alcohol or wine to any person who is of intemperate habits or addicted to the use of any narcotic drug, or knowingly sell or give the same to any one to be used for any purpose other than that named in said affidavit or prescription, or who shall sell or give away any liquors without such affidavit or prescription, he shall be deemed guilty of a misdemeanor and punished by fine of not less than one hundred nor more than five hundred dollars and confined in the county jail not less than thirty days nor more than six months. In any prosecution against a druggist, owner of a drug store, registered pharmacist, clerk or employe, for selling or giving liquor contrary to law, if a sale or gift be proven, it shall be presumed that the same was unlawful in the absence of satisfactory proof to the contrary and the presentation of such prescripton or affidavit by the defendant at the time of the trial for such sale or gift, shall be sufficient to rebut the presumption arising from the proof of such sale

or gift. *Provided*, the jury shall believe, from all the evidence in the case, that such sale or gift was made in good faith under the belief that such prescription or affidavit and statements therein were true; and, *provided, further*, that such druggist, owner of a drug store, registered pharmacist, clerk or employe shall have complied with all other provisions of this act relating to the sale or gift.

An indictment against any druggist, registered pharmacist, clerk or employe, for any offense committed under the provisions of this section, shall be sufficient, if in the form and effect following:

State of West Virginia,

County of.....to-wit:

In the Circuit Court of said County:

The grand jurors in and for the body of the said county of ....., upon their oaths do present that A. B., within one year next prior to the finding of this indictment, in the said county of.....did unlawfully sell, give, offer, expose, keep and store for sale and gift, liquors, against the peace and dignity of the state.

Sec. 5. If any person who is of intemperate habits or addicted to the use of any narcotic drug shall make the affidavit mentioned in the preceding section, or if any person making such affidavit shall use as a beverage, or for any purpose, or at any place other than that stated in such affidavit, or shall knowingly permit another to do so, said alcohol or wine, or any part thereof, or shall knowingly make any false statement in such affidavit, he shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred nor more than five hundred dollars, and be confined in the county jail not less than two nor more than six months for the first offense hereunder; and for the second offense he shall be deemed guilty of a felony and punished by confinement in the penitentiary not less than one nor more than five years.

And if any physician who is not in good standing in his profession or who is of intemperate habits, or who is addicted to the use of any narcotic drug, shall issue any such prescription as is mentioned in the last preceding section; or if any physician shall issue such prescription without, at the time, making a personal examination of the person for whom the liquor is prescribed, or shall prescribe for any person who is in the habit of drinking to intoxication and whom he knows, or has reason to believe is in the

habit of drinking to intoxication, or shall give such prescription and make the statements therein required, or any part thereof, falsely, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred nor more than five hundred dollars and imprisoned in the county jail not less than thirty days nor more than six months, and in addition thereto, for the first offense under this statute, the court may, in its discretion, suspend the license of such physician for a period of six months and for each offense thereafter the court shall suspend such license for a period of six months.

Sec. 6. Every person who shall directly or indirectly keep or maintain by himself or by associating with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club house, or other place in which any liquor is received or kept for the purpose of use, gift, barter or sold as a beverage, or for distribution or division among the members of any club or association by any means whatsoever; and every person who shall use, barter, sell or give away, or assist or abet in bartering, selling or giving away any liquors so received or kept, shall be deemed guilty of a misdemeanor and upon conviction thereof be punished by fine of not less than one hundred nor more than five hundred dollars and by imprisonment in the county jail not less than thirty days nor more than six months; and in all cases the members, share-holders or associates in any club or association mentioned in this section, shall be competent witnesses to prove any violations of the provisions of this section, or of this act, or of any fact tending thereto; and no person shall be excused from testifying as to any offense committed by another against any of the provisions of this act by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him.

Sec. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating

this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however, that* nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word "home" as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further, that* no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and, *provided, further, however, that* in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes. [Amendment of Legislature of 1915.]

Sec. 8. If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise for himself or another of the sale or keeping for sale of liquors, or shall circulate or distribute any price-lists, circulars or order blanks advertising liquors or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisement or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than five hundred dollars.

Sec. 9. Every justice of the peace and every circuit, criminal or intermediate court, or the judges thereof in vacation, and every mayor of any city, town or village, upon information made under oath or examination that any person is manufacturing, selling, offering, or exposing, keeping or storing for sale or barter, contrary to law, any liquors, or that the affiant has cause to believe and does believe that such liquors so manufactured, sold, offered, kept or stored for sale or barter in any house, building or other place named therein, contrary to the provisions in this act, shall

issue his warrant requiring the person suspected to be brought before him for examination, or the said house, building or other place to be searched, and the parties found therein to be arrested and brought before him as aforesaid; and requiring the officer to whom it is directed to summon such witnesses as shall be therein named, or whose names are endorsed thereon to appear and give evidence on the examination, and in the same warrant shall require the officer to whom it is directed to seize and hold all liquors found therein, also vessels, bar fixtures, screens, glasses, bottles, jugs and other appurtenances apparently used in the sale, keeping or storing of such liquors contrary to law.

Sec. 10. If, upon examination of such person, it shall appear to such justice, court, judge or mayor, that there is probable cause to believe him guilty of the offense charged, the accused shall be required to enter into a recognizance, with sufficient securities, in the sum of not less than five hundred dollars, to appear before the next term of the circuit or criminal or intermediate court of the county having jurisdiction, to answer an indictment if one be preferred against him; and upon his failure to enter into such recognizance, the justice, court, judge or mayor shall commit him to jail to answer such indictment. All material witnesses shall also be recognized with or without sureties, as such justice, court, judge or mayor may deem proper, to appear before the grand jury at the next term of such court and give evidence against the accused, and such justice, court, judge or mayor shall require the accused to give bond with sufficient security in the sum of five hundred dollars conditioned that he will not violate any of the provisions of this act during the time intervening between the date of such bond and the adjournment of the next grand jury term of said circuit or criminal or intermediate court of the county; and upon his failure to give such bond, the justice, court, judge or mayor shall commit him to jail until such bond is given or until he is discharged therefrom by the circuit or intermediate court of the county.

Sec. 11. Whenever liquors shall be seized in any room, building or place which has been searched under the provisions of this act, the finding of such liquors in such room or of a government license therein shall be *prima facie* evidence of the unlawful selling, and keeping and storing for sale of the same by the person, or persons, occupying such premises, or by any person named in any government license posted in such room, or his associates,

agents or employes thereunder, and the proprietor or other persons in charge of the premises where such liquor was found, or who is so named in such government license, and his associates, shall be subject to trial by due process of law on the charge of selling or keeping or storing for sale unlawfully such liquor, under the indictment and form prescribed in section three of this act, and upon his conviction of selling, offering, storing or exposing for sale such liquor unlawfully, the liquor found upon said premises shall at once be publicly destroyed by some responsible person to be appointed by the court.

Sec. 12. If in such house, building or place, as is hereinbefore mentioned, the sale, offering, storing or exposing for sale of liquors is carried on clandestinely, or in such manner that the person so selling, offering, exposing, keeping or storing for sale, cannot be seen or identified by the officer or officers charged with the execution of a warrant issued under sections ten and eleven of this act, any such officer may, whenever it is necessary for the arrest or identification of the person so offending, or the seizing of such liquor, break open and enter such house, building or place.

Sec. 13. The payment of the special tax required of liquor dealers by the United States by any person, or persons other than druggists, within the state, shall be *prima facie* evidence that such person, or persons, are engaged in keeping and selling, offering and exposing for sale, liquors contrary to the laws of this state, and a certificate from the collector of internal revenue, his agents, clerks or deputies, showing the payment of such tax, and the name or names of person to whom issued, and the names of the person or persons, if any, associated with the person to whom such tax receipt is issued, shall be sufficient evidence of the payment of such tax, and of the association of such persons for the selling and keeping, offering and exposing for sale of liquors contrary to the provisions of this act in all trials or legal inquiries.

Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever, as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common

and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, building or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

Sec. 15. The state tax commissioner shall be *ex-officio* state commissioner of prohibition. Wherever the word "commissioner" is used in this act, it shall mean and be taken to mean the state commissioner of prohibition.

Sec. 16. It shall be the duty of the commissioner, his deputies and agents, to superintend the enforcement of all provisions of this act, and of laws of this state affecting the manufacture, sale, keeping, exposing or offering for sale, or giving or soliciting or receiving orders for liquors, or laws connected in any way with the liquor traffic, to diligently inform themselves of all violations of such laws and either make report thereof to the prosecuting attorney of the proper county, who shall forthwith prosecute the same as provided by law, or said commissioner, his agents or deputies, shall make complaint of any violations of any such laws before the proper court or committing justice, and conduct the prosecution thereof in any court in the state having jurisdiction of such matters; and for the purpose of enforcing such laws, the said commissioner, his agents and deputies, shall have all the powers now vested in the prosecuting attorneys of this state and the attorney general thereof, and of sheriffs, their deputies, and constables and police officers of the state. *Provided*, that nothing in this act shall be construed to take from such prosecuting attorneys or the attorney general, or his assistants, any of the powers now conferred upon them by law, except as herein provided, or to relieve any of the said officers from any duty imposed upon him by any statute of this state.

Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.



It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill are true, the court shall order that no liquors shall be sold, bartered, given away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof, for a period of not to exceed one year in the discretion of the court from and after such finding, in case of a drug store; in other cases the order for abatement shall be perpetual.

Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the impanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein.

Sec. 18. In addition to the penalties prescribed for violation of any of the provisions of sections two to sixteen, inclusive, of this act, the court may in its discretion, when such conviction is had, require the defendant to execute bond with good security to be approved by the court or clerk thereof, in the penalty of one thousand dollars, conditioned not to violate any of the provisions of any of said sections for the term of two years, and in default of such bond may commit the defendant to jail for said term of two years, unless such bond be sooner given.

Sec. 19. All express companies, railroad companies and transportation companies within this state are hereby required to keep books in which shall be entered immediately upon receipt thereof the name of every person to whom liquors are shipped; the amount and kind received; the date when delivered, and by whom, and to whom delivered; after which record shall be a blank space, in which the consignee shall be required to sign his name in person to such record, which book shall be open to the inspection of any state, county or municipal officer of this state, at any time during business hours of the company; except that in the absence or sickness of a duly licensed druggist, having

authority to sell pure grain alcohol and wine for the purposes prescribed by law, a registered pharmacist in the employ of such druggist, duly designated by such druggist, in writing personally signed by him, to the agent of the transportation company, may sign such druggist's name to the record of shipments of alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, such registered pharmacist being required to write immediately beneath such druggist's name his own name and his connection with such druggist. Such books shall constitute *prima facie* evidence of the facts therein stated, and be admissible as evidence in any court in this state having jurisdiction, or in any manner empowered with the enforcement of the provisions of this act. Any employe or agent of any express, railroad company or transportation company knowingly failing or refusing to comply with the provisions of this section, shall be guilty of a misdemeanor and punished by a fine of not less than fifty nor more than one hundred dollars, and may be imprisoned in the county jail not less than thirty days nor more than six months. *Provided, however, that nothing herein contained shall permit, or be construed as permitting or authorizing, any common carrier or transportation company to bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use, other than pure grain alcohol and wine, and such preparations for druggists as may be sold by them for the special purposes and in the manner set forth in sections four and twenty-four. [Amendment of Legislature of 1915. In effect February 20, 1915.]*

Sec. 20. Any citizen or organization within this state may employ an attorney to assist the prosecuting attorney to perform his duties under this act, and such attorney shall be recognized by the prosecuting attorney and the court as associate counsel in the proceedings; and no prosecution shall be dismissed over the objection of such associate counsel until the reasons of such prosecuting attorney for such dismissal, together with the objections thereof of such associate counsel, shall have been filed in writing, argued by counsel and fully considered by the court.

Sec. 21. The prosecuting attorney of any county, with the approval of the governor, or of the court of the county vested with authority to try criminal offenses, or of the judge thereof in vacation, may, within his discretion, offer rewards for the apprehension of persons charged with crime, or may expend money for the detection of crime. Any money expended under this section shall, when ap-

proved by the prosecuting attorney, be paid out of the county fund in the same manner as other county expenses are paid.

Sec. 22. In all cases arising under this statute the state shall have the right to appeal.

Sec. 23. This entire act shall be deemed an exercise of the police powers of the state for the protection of public health, peace and morals, and all of its provisions shall be liberally construed for the attainment of that purpose.

Sec. 24. The manufacture of alcohol, wine and liquors, and the sale of the same by the manufacturer and by wholesale druggists, shall be under the supervision of the commissioner and under such rules and regulations as he may from time to time prescribe.

Sec. 25. Paragraphs b, c, d, h and y of section one, and section ten, section forty, section sixty-six, section seventy-four, section seventy-seven, sections eighty-seven, eighty-eight, eighty-eight-a, section ninety-two and section one hundred and twenty-a of the code of one thousand nine hundred and six, as amended and re-enacted by chapter eighty-two of the acts of one thousand nine hundred and seven, and sections eighty-seven, eighty-seven-a and section one hundred and twenty-a of chapter sixty-eight of the acts of one thousand nine hundred and nine, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 26. All of the provisions of this act shall take effect on the first day of July, one thousand nine hundred and fourteen.

Sec. 27. If any corporation or association shall violate any of the provisions of this act, any officer, agent or employe thereof acting for it in any such unlawful act, or authorizing the same to be done, shall be personally guilty thereof the same as though such officer, agent or employe himself had committed the offense, and shall be subject to all of the fines, penalties and imprisonments therefor. [Amendment of Legislature of 1915.]

Sec. 28. It shall be unlawful for any person to give, under the proviso in section seven, or otherwise, intoxicating liquors to any minor, person of intemperate habits, or one who is addicted to the use of any narcotic drug. If any person shall violate the provisions of this section he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars, nor more than five hundred dollars, and imprisoned in the county jail not more than six months. [Amendment of Legislature of 1915.]

Sec. 29. If any county, district or municipal officer, or any municipal police, shall fail, refuse or neglect to discharge any duty im-

posed upon him by law, prohibiting the manufacture, sale, keeping and storing for sale of intoxicating liquors, he shall be removed from office in the manner provided in this section. Such removal shall be made by the circuit court of the county wherein such officer resides. The charges against any such officer shall be reduced to writing, and entered of record by the court, and a summons shall thereupon be issued by the clerk of such court, containing a copy of the charges, and requiring the officer named therein to appear and answer the same on a day to be named therein, which summons may be served in the same manner as a summons commencing an action may be served, and the service must be made at least five days before the return day thereof. And the court itself shall, without a jury, hear the charges, and upon satisfactory proof thereof, remove any such officer from the discharge of the duties of his office, and place the records, papers and property of his office in the possession of some other officer or person for safekeeping until the vacancy is filled. Any vacancy created under this section shall be filled in the manner required by law as to county and district officers, and in the manner prescribed by the ordinances of the municipality. Any citizen of the county, district or municipality, as the case may be, or the commissioner of prohibition, may prefer and prosecute to final judgment charges for removal against any of the officers, including municipal police, mentioned in this section. The word "officer", as used herein, shall include and embrace municipal police. Either party shall have the right of appeal to the supreme court of appeals of the state from the judgment of the circuit court. [Amendment of Legislature of 1915.]

Sec. 30. Whenever it shall be made to appear to any criminal or circuit court, having the trial of offenses under this act, that the state cannot have a fair and impartial trial by jury in the county wherein an indictment has been returned, charging an offense under this act, the court shall enter an order of record to such effect. In said order the court shall fix a day for the trial of the accused, and in such order shall be indicated the county from which jurors shall be drawn to try the accused, and the number of jurors to be drawn. An attested copy of such order shall be certified to the judge of the circuit court of the county designated, and thereupon the judge of such circuit court shall, by order, direct that a jury be drawn, in the manner provided by law for the drawing of petit jurors in his county, and proceedings respecting the drawing of such jurors, including the names of the jurors, shall be certified by the

clerk of the circuit court of the county designated to the clerk of the court wherein the accused is to be tried. Thereupon writ of *venire facias* shall be issued by the clerk of the court wherein the accused is to be tried, directed to the sheriff of the county wherein the jurors have been drawn, commanding him to summon the jurors so drawn to attend for jury service in the county wherein the accused is to be tried upon the day named in the writ. Said jurors shall attend for the purpose of the trial of the accused, and the jury shall be selected in the manner provided by law. For their services, the jurors so drawn shall be paid the per diem and mileage out of the same funds that the jurors of the county wherein the accused is to be tried are paid. [Amendment of Legislature of 1915.]

Sec. 31. It shall be unlawful for any person to bring or carry into the state, or from one place to another within the state, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the side or top of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kind of liquors contained therein. If any person shall violate this section, he shall be deemed guilty of a misdemeanor; and the liquors in the possession of any person violating this section may be seized, and shall be conclusive evidence of the unlawful keeping, storing and selling of same by the person having such liquors in his possession; and upon the conviction of such person he shall be subject to the fines and imprisonments as provided for in section three. [Amendment of Legislature of 1915.]

Sec. 32. A justice of the peace shall have concurrent jurisdiction with the circuit court and other courts having criminal jurisdiction in his county for the trial of first offenses arising under this act. The defendant shall be entitled to a trial by jury, if he shall demand the same, upon depositing with the justice the amount as fixed by law for payment for attendance of the jurors. The state shall have the same right as the defendant to peremptorily challenge any two of the jurors selected and returned by the officer under the writ issued by the justice commanding the summoning of the same. Upon conviction of the accused, the justice shall impose the fines and penalties and required bonds as provided by this act for first offenses; and shall thereupon certify to the prosecuting attorney, for filing in his office, a transcript from his docket of the judgment in the case. Such transcript shall be admissible evidence

upon the trial of the accused for any second offense alleged in an indictment found and returned against him. The justice shall also certify to the prosecuting attorney copies of all bonds given by the defendant upon conviction. The state shall have the same right of appeal as the defendant from any judgment of the justice. Whenever the prosecuting attorney of the county shall appear for the state for any prosecution for any offense under this act, there shall be allowed and taxed as part of the costs a fee of ten dollars, to be recovered and collected by the prosecuting attorney in the same manner as like fees are collected in criminal and other courts wherein trials are had upon indictments. The provisions of section twenty of this act shall apply to trials before a justice of the peace. *Provided, however,* that in any prosecution before a justice of the peace, the prosecuting attorney, or the state commissioner of prohibition or any of his deputies, shall have the right, before trial, to elect whether the case shall be tried and judgment entered, or whether the justice shall hold a preliminary hearing to determine whether the accused shall be held to the grand jury; *provided, however,* that should the defendant desire to confess, then neither the prosecuting attorney, nor the state commissioner of prohibition or any of his deputies, shall have such right to elect, and the justice shall enter judgment upon the confession. [Amendment of Legislature of 1915.]

Sec. 33. Any person called on behalf of the state to testify concerning any violations of this act, who shall give freely and truthfully any testimony tending in any way to incriminate himself, shall be immune from prosecution under this act. [Amendment of Legislature of 1915.]

son violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

Passed May 24, 1915, effective August 22, 1915.

Copies of the West Virginia Prohibition Law of February 11, 1913, known as the Yost Law, are bound in pamphlet form in our brief in No. 857. The law was amended in January, 1915, during the pendency of these cases. Copies of the law as so amended were distributed at the argument in pamphlet form entitled "West Virginia Prohibition Law including Amendments made by the Legislature of 1915." Now comes a further amendment adding an additional section (No. 34).

As the purpose of these suits is to compel the defendants to carry interstate shipments of liquor into West Virginia for the personal use of consignees, the form of the decree will depend upon the state of the law of West Virginia at the time the decree is entered. At pages 15-17 of the brief for the State of West Virginia it was contended that the amendment of section 7 in January, 1915, had the effect of rendering moot our claim that section 3 of the law was not intended to



apply to interstate shipments for personal use, and it will doubtless now be contended that interstate shipments of intoxicating liquors for personal use are absolutely prohibited by the amendment of May 24, 1915, and that such prohibition is authorized by the Webb-Kenyon Law.

We submit that the amendment of May 24, 1915, is in contravention of the commerce clause of the Constitution of the United States, as a direct regulation of interstate commerce, beyond the power of the State of West Virginia either under the supposed authority of the Webb-Kenyon Law or otherwise; and also that it is in contravention of the Fourteenth Amendment for the reasons stated in our reply brief.

Respectfully submitted,

Lawrence Maxwell,

Joseph S. Graydon,

Walter C. Capper,

J. Philip Roman,

Counsel for Appellant.

No. [REDACTED] 31875

# SUPREME COURT OF THE UNITED STATES

October Term 1914

THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,*

*vs.*

THE WESTERN MARYLAND RAILWAY COM,  
PANY AND THE STATE OF WEST  
VIRGINIA.

*Appeal from the District Court of the United States for  
the District of Maryland.*

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

FRED. O. BLUE,  
Counsel for the State  
of West Virginia,  
Appellee.



No. 857.

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**SUPREME COURT OF THE UNITED STATES**

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**October Term 1914**

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THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,*

*vs.*

THE WESTERN MARYLAND RAILWAY COM-  
PANY AND THE STATE OF WEST  
VIRGINIA.

---

*Appeal from the District Court of the United States for  
the District of Maryland.*

---

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

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This case differs in no material respect from the James Clark Distilling Company, Appellant, *v.* The American Express Company and the State of West Virginia, No. 858, this term. The proceedings in the cases are the same. The assignments of error are the same.

Our answer to the first error assigned by appellant, is this:

Under the laws of West Virginia, in case of a sale in which a shipment or delivery of intoxicating liquors is made by a common or other carrier, the sale of such liquors shall be deemed to be made in the county in said state wherein delivery of such intoxicating liquors is

made to the consignee by such common or other carrier; although the shipment might have been made by a dealer residing out of the state, upon an order received by him to be filled at his place of business, for shipment and delivery by the carrier to the consignee in West Virginia, for the personal use of the consignee.

Our answer to appellant's second assignment of error is this:

(a) The Yost law prohibits any person, resident or non-resident, soliciting within the state orders for intoxicating liquors. This is valid, although such orders may only contemplate a contract resulting from final acceptance in another state. Soliciting of orders is part of the sale. A sale is forbidden in the state. If the sale is forbidden, so is any constituent or accessory part thereof forbidden.

(b) The soliciting of orders for intoxicating liquors can be done by letters, price lists and order blanks, the same as though the dealer solicited in person.

For reasons given in support of the above answers to appellant's assignment of errors set forth in our brief No. 858, we respectfully submit that the decree complained of should be affirmed.

FRED. O. BLUE,  
*Counsel for the State of  
West Virginia, Appellee.*

## INDEX.

	Page.
Statement of the case .....	1
Intervening petition of the State of West Virginia .....	8
Grounds for appeal direct from the District Court .....	12
Assignment of Errors .....	12
The West Virginia statute does not deal with the subject matter of interstate shipments of liquor to consignees in that state who have purchased the same elsewhere for their personal use .....	14
The constitutional amendment and the stat- ute deal only with the manufacture, sale and keeping for sale of liquors in West Virginia .....	15
Provisions of the statute .....	17
The West Virginia Law is not to be con- strued as dealing with the advertising through the mails of interstate sales for personal use .....	24
The law is not to be construed as undertak- ing to make the place of delivery in West Virginia of interstate shipments for per- sonal use, the place of sale .....	27
The statute of West Virginia cannot constitution- ally make it an offense for a dealer at Cumber- land, Maryland, to solicit by mail orders from	

citizens of West Virginia for the sale of liquors at Cumberland and their transportation in inter- state commerce .....	29
The statute of West Virginia cannot constitution- ally make the place of delivery in West Virgi- nia, of an interstate shipment for personal use, the place of sale, and prohibit the interstate carrier from delivering such shipments .....	34
A citizen of West Virginia has the constitutional right to order and have delivered to him in in- terstate commerce liquors for his personal use..	35
The Webb-Kenyon Law does not authorize the ap- plication of a state statute to an interstate ship- ment for lawful personal use .....	39
Text of the law .....	39
Purpose of the law as shown by debates in Congress .....	41
Cases construing the Webb-Kenyon Law in accordance with our contention .....	45
Cases involving imported liquors intended to be used in violation of law distin- guished .....	62
The Webb-Kenyon Law as construed and applied by the lower court would be unconstitutional ..	69
Conclusion .....	70



## Index of Cases, Etc.

	Page.
Act to Regulate Commerce .....	4
Adams Express Company vs. Commonwealth, 154 Ky. 471 .....	36, 45
Adams Express Company vs. Commonwealth, 160 Ky. 66 .....	40
Adams Express Company vs. Kentucky, No. 271, October Term, 1914 .....	21
Adams Express Company vs. Kentucky, 206 U. S. 129 .....	28, 34
American Express Company vs. Beer, 65 Sou. 575 .....	66
Anderson Net & Twine Company vs. Worthington, 141 U. S. 468 ..	40
Atkinson vs. Southern Express Co., 94 S. C. 44 .....	65
Bristol Distributing Company vs. Southern Express Company, (Supreme Court of Appeals of Virginia) .....	60
Calhoun vs. Commonwealth, 154 Ky. 70 .....	36
Clark Distilling Company vs. Western Maryland Railway Company, No. 857, October Term, 1914 .....	10
C. N. O. & T. P. Ry. Co. vs. Kentucky, 115 U. S. 321 .....	22
Commonwealth vs. Campbell, 133 Ky. 50 .....	36
Commonwealth vs. Smith, 163 Ky. 227 .....	36
Congressional Record, December 19, 1912 .....	43
Congressional Record, February 8, 1913 .....	42
Constitutional Amendment of West Virginia of November 5, 1912	15
Delamater vs. South Dakota, 205 U. S. 93 .....	29, 30
Delaware vs. Grier, 88 Atl. 579 .....	50
Downes vs. Bidwell, 183 U. S. 244 .....	41
Dunlap vs. United States, 173 U. S. 65 .....	41
Edgell vs. Conaway, 24 W. Va. 747 .....	22
Eldge vs. Bessemer, 164 Ala. 599 .....	36
Hamm Brewing Company vs. Chicago, R. I. & P. Ry. Co., 215 Fed. 672 .....	55
Hayner vs. State, 83 Ohio State 178 .....	31
Holy Trinity Church vs. United States, 143 U. S. 457 .....	41
Iowa vs. United States Express Co., 145 N. W. 451 .....	62
Johnson vs. Southern Pacific Ry. Co., 196 U. S. 19 .....	40
Judicial Code of the United States, c. 231, 36 Stat. 1157 .....	12
Kansas vs. Doe, 92 Kans. 212 .....	64
Knights Templars vs. Jarman, 187 U. S. 197 .....	22
L. & N. R. R. Co. vs. Cook Brewing Co., 223 U. S. 70 .....	34, 70
Maine vs. Bass Publishing Co., 104 Me. 288 .....	31
Martin vs. Commonwealth, 153 Ky. 784 .....	36
Palmer vs. Southern Express Co., 165 S. W. 236 .....	53
Peede, Ex parte, 170 S. W. 749 .....	56
Palliser, In re, 136 U. S. 257 .....	32

	Page.
Prohibition Law of West Virginia, effective July 1, 1914	15, 16
Rahrer, In re, 140 U. S. 155	69
Rhodes vs. Iowa, 170 U. S. 412	69
Rose vs. State, 133 Ga. 353	26, 29
Smith vs. Southern Express Company, 82 S. E. 15	64
Southern Express Co. vs. Alabama, 66 Sou. 115	58
Southern Express Company vs. City of High Point, 83 S. E. 254	59
State vs. Cardwell, 166 N. C. 308	65
State vs. Gilman, 33 W. Va. 146	35
State vs. Swift, 35 W. Va. 542	26
State vs. Wheat, 48 W. Va. 259	26
State vs. Williams, 146 N. C. 618	36
United States vs. Delaware & Hudson Co., 213 U. S. 366	22
United States vs. Thayer, 209 U. S. 39	32
United States, ex rel, vs. Oregon etc. Navigation Co., 210 Fed. 378	66
Vance vs. Vandercook, 170 U. S. 439	38
VanWinkle vs. Delaware, 91 Atl. 385	39, 40, 50
Webb-Kenyon Law	39
West Virginia vs. Adams Express Co., 219 Fed. 794	11, 15, 22, 68
West Virginia vs. Adams Express Co., 219 Fed. 331	14, 60
Zinn vs. State, 88 Ark. 273	31

**No. 858.**

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**SUPREME COURT OF THE UNITED STATES.**

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**October Term, 1914.**

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**The James Clark Distilling Company, Appellant,**

**vs.**

**The American Express Company and the State of  
West Virginia.**

---

**Appeal from the District Court of the United States  
for the District of Maryland.**

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**BRIEF FOR APPELLANT.**

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**Statement of the Case.**

This was a bill in equity (R. 1) by the James Clark Distilling Company, a corporation under the laws of Maryland, engaged in the business of manufacturing and selling spirituous liquors at Cumberland in that state. Defendant operates an express business over the railroad of the Western Maryland Railway Company in the states of Maryland, Pennsylvania and West Virginia, having a line which extends from

Cumberland, Maryland, into and through the counties of Mineral, Grant and Tucker, in the State of West Virginia, comprising the 16th judicial circuit of that state. Defendant is a common carrier engaged in interstate commerce within the meaning of the act of Congress, entitled "An Act to regulate commerce" and the amendments thereto. The bill charges that defendant is equipped with all facilities for the handling of interstate commerce from Cumberland, Maryland, and its delivery at stations at various towns in Mineral, Grant and Tucker Counties, West Virginia, including the town of Parsons in Tucker County.

In the 5th paragraph of the bill it is stated that on August 20, 1914, plaintiff received at Cumberland, Maryland, by mail, a written order from one Floyd Rosier, a resident of the town of Parsons, West Virginia, to ship to him at Parsons, from Cumberland, Maryland, four quarts of alcohol of 1.88 proof, by express, which order to ship said liquor was accompanied by a money order for \$4.00, the purchase price of the alcohol. The bill alleges that the order stated on its face that the alcohol was for the personal use of said Rosier and that the order was given without any solicitation on the part of any person inducing Rosier to send the same. The bill charges that complainant believes that said alcohol was intended for the personal use of Rosier, and has no reason to suspect that the order for said liquor was given or intended in any way to violate the laws of the State of West Virginia. On August 20th, the day the order was

received, complainant prepared one gallon of alcohol in pursuance of said order and presented the same to the agents of defendant company at Cumberland for transportation to the consignee at Parsons, tendering the transportation charges, but the agents of defendant at Cumberland refused to accept the shipment, giving as the reason, and the only reason for said refusal, that the company had been enjoined by an order of the Circuit Court of Tucker County, West Virginia, from receiving, transporting or delivering any intoxicating liquors at or in said three counties in West Virginia, "except on conditions set out in said injunction which were so burdensome to said business and traffic and interstate transportation of said liquors, as made it impossible for said express company to comply with the same."

Paragraph 7 of the bill refers to an act of the legislature of West Virginia, passed February 11, 1913, effective July 1, 1914, prohibiting the manufacture and sale or keeping for sale of spirituous liquors, etc., in the state of West Virginia, and charges that the transportation of the liquors purchased by Rosier was not prohibited by the law of West Virginia, and that the injunction granted by the Circuit Court of Tucker County and served upon defendant company was no legal excuse for the refusal of defendant to accept and transport said liquors in interstate commerce.

Paragraph 8 of the bill alleges that complainant has on hand in the state of Maryland a large and valuable quantity of liquors of the kinds described in the

law of West Virginia, effective July 1, 1914, and that prior to the service of the injunction of the Tucker Circuit Court upon defendant, complainant was doing a profitable business in shipping such liquors to persons residing in West Virginia for their personal use; that complainant has been informed by defendant and The Western Maryland Railway Company, being the only common carriers available, that said companies will not hereafter accept for transportation from complainant at Cumberland, Maryland, any intoxicating liquors consigned to complainant's customers in said three counties of West Virginia. It is alleged that unless defendant is restrained by order of the district court from persisting in its refusal to carry and deliver complainant's product in such interstate commerce, complainant's business will be destroyed and its profits therein exceeding the sum or value of \$3,000.00 will be lost.

It is charged that defendant has violated, and unless enjoined by order of the court will continue to violate, to complainant's irreparable injury for which it has no adequate remedy at law, sections 1 and 3 of the Act to Regulate Commerce and Amendments thereof, by subjecting complainant's business and traffic therein to undue and unreasonable prejudice and disadvantage.

The prayer of the bill (R. 7) is that a decree issue; "commanding and enjoining the defendant, its servants, agents, employees and officers and each of them, to cease refusing to accept for

transportation, over its express line in due course of business, from Cumberland to points of delivery in the counties of Mineral, Grant and Tucker, State of West Virginia, all such aforesaid liquors, ordered by the said Floyd Rosier or other customers of your orator, for their own personal use, and without solicitation on the part of your orator, and enjoining and commanding the defendant, its servants, agents, employees and officers, to accept from your orator all such merchandise as aforesaid, presented to it for shipment over its lines to said points in West Virginia, and enjoining and commanding the defendant, its servants, agents, employees and officers, to transport the same in interstate commerce, from Cumberland, in the State of Maryland, to all such points on its express line in the said three counties of West Virginia, where the defendant maintains a permanent office or station with a regular agent for receiving and delivering such goods, and for the keeping of a record of the same as required by the laws of West Virginia, and perpetually requiring and commanding the defendant, its agents and servants to deliver all such liquors, presented for shipment by your orator, over its line at said points in said three counties of West Virginia, to the consignees thereof upon such aforesaid orders of your orators customers, and that your orator may have such other and further relief as its case may require."

The answer (R. 8) admits all allegations of fact stated in plaintiff's bill, but not plaintiff's deductions therefrom, and shows that,



“in a suit in the Circuit Court of Tucker County, West Virginia, in equity, entitled ‘The State of West Virginia who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, Plaintiff, vs. The American Express Company, an association doing business in the State of West Virginia,’ an order or decree was, on the 10th day of August, 1914, passed by said court, a copy of which is herewith filed as a part hereof, marked ‘Defendant’s Exhibit No. 1’ by which this respondent was enjoined and prohibited from transporting intoxicating liquors to Tucker County, West Virginia, as set forth in said order; and this respondent is advised that it cannot transport intoxicating liquors to Parsons, West Virginia, without the risk of violating the laws of the state of West Virginia and the terms of said injunction.”

Defendant’s Exhibit No. 1 to its answer (R. 9) is an order of the Circuit Court of Tucker County, West Virginia, made in vacation, enjoining the American Express Company from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of Tucker County, or elsewhere within the jurisdiction of the court,

“unless said defendant express company has first ascertained, by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of

the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere, within the jurisdiction of the court, unless said express company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the Court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself or by associating with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person unless the consignee signs the defendant's liquor record, in his own proper person, and not in the

name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof. And that the defendant, The American Express Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within the said county of Tucker, or elsewhere within the jurisdiction of the Court, other than is consistent with the allegations and prayer of said bill."

On the 19th day of October, 1914 (R. 12), the state of West Virginia presented a petition to be made a party and intervene in the case. The petition was allowed and the state was made an intervening party without objection by the other parties, by an order of the court, dated December 9, 1914 (R. 24). The petition of the state (R. 12) shows that on the 10th day of August, 1914, the state filed the bill and obtained the injunction heretofore referred to in the Circuit Court of Tucker County. Copies of the bill and injunction are attached to the petition as exhibits, and the allegations therein contained are adopted by the state as a part of its petition. The petition then alleges that plaintiff, The James Clark Distilling Company has been circulating printed and written letters, order blanks and price lists in the state of West Virginia, and particularly in the 16th judicial circuit thereof, soliciting orders for intoxicating liquors to be shipped

to consignees in said district; that complainant has been shipping such liquors since the first day of July, 1914, to citizens of West Virginia "without any effort to ascertain the character, ages and habits of the person who ordered the same, nor the purposes to which they intended to put such intoxicating liquors." It is then alleged that "by provisions of the statute of your petitioner relative to intoxicating liquors, in case of any sale, and the shipment of intoxicating liquors into the state of West Virginia by common or other carrier, the sale thereof is deemed to be made at the county where the intoxicating liquors are delivered. That the statute of your petitioner, respecting intoxicating liquors, forbids the sale of, or soliciting of orders for, any intoxicating liquors in this state except the sale of pure grain alcohol by druggists, etc." It is further alleged that in delivering intoxicating liquors within West Virginia, a common carrier is required to use good faith to ascertain that such liquors are not intended to be used in violation of law; that plaintiff made no effort to ascertain the "age, habits or character of Floyd Rosier" or to ascertain "the purposes, lawful or otherwise, that said Rosier intended to exercise respecting the intoxicating liquors mentioned in the bill" and that plaintiff has shipped other intoxicating liquors since July 1, 1914, into West Virginia "regardless of the purpose or use that the persons so receiving the same might make thereof."

The state's intervening petition does not allege any facts in regard to the age, habits or character of Rosier

or any of the consignees, or that any of them have used or will use any liquors shipped by plaintiff for illegal purposes and in violation of the law of West Virginia. The petition does not undertake to deny the allegation in the verified bill that complainant's shipments are intended for the lawful, personal use of the consignees.

The prayer of the state's intervening petition is that the relief prayed by complainant to establish its right to ship in interstate commerce for personal use be denied.

The cause was set for hearing and evidence produced by both parties (Transcript of Evidence R. 25), this case being heard along with the case of James Clark Distilling Company vs. Western Maryland Railway Company in which the state was intervenor and which is pending here as No. 857, October term 1914. The evidence was largely directed to questions of fact conceded by the pleadings not to be in issue. Some of the evidence was directed to the question whether James Clark Distilling Company had since the 1st day of July, 1914 by letters or circulars advertised its product in West Virginia. In our opinion the disputed questions of fact disclosed in evidence are immaterial and the questions necessary to be decided here are purely questions of law.

It appeared in evidence (R. 35) that the injunction obtained by the state against the express company in the Circuit Court of Tucker County was a preliminary injunction issued ex parte and that the express com-

pany made no motion to dissolve, filed no answer, and did not attempt to carry interstate shipments of liquor under the conditions which the injunction prescribed, but refused absolutely to continue such interstate business.

On December 18, 1914, the court handed down an opinion which appears at R. 35, and is reported in 219 Fed. at p. 333, 339, finding the equities with plaintiff and ordering a decree granting the relief prayed in the bill. A decree in pursuance of the opinion was entered December 24, 1914 (R. 40). Thereafter, on January 15, 1915, the court of its own motion having come to the conclusion that there was probable error in the decree of December 24, 1914, directed a re-argument (R. 44). Re-argument was had on January 23, 1915, and a final decree (R. 44) dismissing the bill in accordance with the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *State of West Virginia, Appellant, vs. Adams Express Company* (R. 45, and 219 Fed. 794) was entered on that day. The decree shows that counsel for complainant objected in open court to the vacation and setting aside of the decree of December 24, 1914, on the ground that the laws of West Virginia set forth in the pleadings are repugnant to the commerce clause of the Constitution of the United States and the Fourteenth Amendment, and that if the application of the laws of West Virginia to the interstate commerce disclosed in evidence is authorized by the Act of Congress known as the Webb-

Kenyon Law, that said law is repugnant to the commerce clause and the Fifth Amendment of the Constitution. The appeal to this court was allowed on presentation by complainant of its petition for appeal and assignments of error in open court.

### **Jurisdiction of the Court.**

The appeal to this court is taken under section 238 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, as a case which involves the construction or application of the Constitution of the United States, and in which the constitutionality of a law of the United States is drawn in question, and in which the constitution and laws of a state are claimed to be in contravention of the Constitution of the United States.

### **Errors Relied On.**

The assignment of errors appears at R. 54. We contend that the lower court erred;

1. In construing the law of West Virginia as undertaking to make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from another state and delivered to the consignee in West Virginia for his personal use, in pursuance of a sale made by the shipper to the consignee in such other state.

2. In construing the constitution and law of West Virginia as prohibiting a liquor dealer in another state



from advertising by letters mailed to citizens of West Virginia, the sale of liquors in such other state, to be transported and delivered in pursuance of such sales to consignees in West Virginia.

We contend further that if the constitution and laws of West Virginia properly construed have the effect given them by the judgment below, that they are in contravention of the commerce clause of the Constitution of the United States and the Fourteenth Amendment; that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law does not authorize the state of West Virginia to apply its constitution and laws to interstate commerce in liquors for personal use, in the manner in which they were applied by the court below; that if the Webb-Kenyon Law does authorize the state of West Virginia to so apply its constitution and laws to such commerce, the Webb-Kenyon Law is repugnant to the commerce clause of the Constitution of the United States and the Fifth Amendment.

**ARGUMENT.****I.**

**THE WEST VIRGINIA LAW DOES NOT UNDERTAKE TO PREVENT THE CARRIAGE AND DELIVERY OF INTERSTATE SHIPMENTS OF LIQUOR TO CONSIGNEES WHO HAVE PURCHASED THE SAME OUTSIDE OF THE STATE OF WEST VIRGINIA FOR THEIR PERSONAL USE.**

The ex parte injunction issued by the Circuit Court of Tucker County against defendant, in effect holds that the West Virginia law prohibits the interstate shipment and delivery of liquor shipments for personal use, when the sale of such liquors outside of West Virginia was preceded or induced by the seller through the method of advertising his product by United States mail. The Supreme Court of Appeals of West Virginia has not construed the law.

In *State of West Virginia vs. Adams Express Co.*, 219 Fed. 331, in the District Court for the Western District of West Virginia, decided October 19, 1914, District Judge Keller held that the West Virginia law did not deal with the subject matter of the sale of liquors by dealers outside of West Virginia to citizens of West Virginia for their personal use, or the interstate transportation of such liquors in pursuance of such sales, or the solicitation of orders by such dealers from such purchasers through the medium of the United States mails. On

appeal the United States Circuit Court of Appeals for the Fourth Circuit in *State of West Virginia, Appellant, vs. Adams Express Co.*, 219 Fed. 794, decided January 13, 1915, reversed this decision. In the court below District Judge Rose construed the West Virginia law (R. 34) in the same manner that it was construed by District Judge Keller in 219 Fed. 331. The final judgment was entered, not as the result of any change of opinion by the court below, but solely in deference to the decision of the United States Circuit Court of Appeals for the Fourth Circuit in 219 Fed., at p. 794 (R. 45).

The West Virginia law, on its face, discloses no purpose to deal with the subject matter of buying and selling liquors outside the state of West Virginia and delivering them to consignees in that state for their personal use.

That law was enacted February 11, 1913, becoming effective July 1, 1914, in pursuance of an amendment to the constitution, ratified at the general election of November 5, 1912, which provided:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state.

Provided, however, that the manufacture and sale and keeping for sale of such liquors for

medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

The amendment to the constitution deals with the subject of "the manufacture, sale and keeping for sale of liquors . . . . in this state." The title of the prohibition law indicates that it was intended to be confined to the same subject matter, to-wit, the manufacture, sale and keeping for sale of liquors. It reads:

"An Act to prohibit the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except the manufacture, sale and keeping for sale for medicinal, pharmaceutical, mechanical, sacramental or scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes as regulated and provided for by this act; and to enforce the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve; and making the state tax commissioner ex officio state commissioner of prohibition, and defining his duties; and providing for the enforcement of this act and providing penalties for the violation thereof."

The material sections of the law are as follows:

Section 1 defines the meaning of liquors under the law.

Section 2 enacts that, except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors are forever prohibited.

Section 3 provides:

“Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned in the county jail not less than two or more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense,

or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.

An indictment for any first offense under this section shall be sufficient if in the form or effect following:

State of West Virginia,

County of .....to-wit:

In the Circuit Court of .....County:

The grand jurors in and for the body of the said county of ....., upon their oaths, do present that A. B., within one year next prior to the finding of this indictment, in the said county of ....., did unlawfully manufacture, sell, offer, keep, store and expose for sale and solicit and receive orders for liquors, and absinthe and drink compounded with absinthe, against the peace and dignity of the state."

Section 4 exempts from the provisions of the law manufacture of wine or cider within the state for do-

mestic consumption; the manufacture and sale to druggists of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes or wine for sacramental purposes; the sale by druggists of pure grain alcohol for such purposes and also of preparations containing alcohol which comply with the West Virginia Pharmacy Law, or the national pure food law. But the sale of such exempted products may be made only upon medical prescription and under the conditions set forth in said section.

Section 6 provides a penalty against any person keeping or maintaining a club house or other place in which any liquor is received or kept for the purpose of use, gift, barter or sale, or for distribution among the members of the club or association.

Section 8 provides:

“If any person shall advertise or give notice by signs, bill-board, newspapers, periodicals or otherwise for himself or another of the sale or keeping for sale of liquors, or shall circulate or distribute any price-lists, circulars or order blanks advertising liquors or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill-boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than five hundred dollars.”



Sections 9, 10, 11, 12, 13 and 14 provide procedure for the enforcement of the law by warrant, arrest, indictment and abatement as for a public nuisance.

Sections 15, 16, 17 and 18 contain provisions authorizing the state tax commissioner as ex officio state commissioner of prohibition to enforce the provisions of the law.

Section 19 provides:

“All express companies, railroad companies and transportation companies within this state are hereby required to keep books in which shall be entered immediately upon receipt thereof the name of every person to whom liquors are shipped; the amount and kind received; the date when delivered, and by whom, and to whom delivered, after which record shall be a blank space in which the consignee shall be required to sign his name in person to such record, which book shall be open to the inspection of any state, county or municipal officer in this state, at any time during business hours of the company. Such books shall constitute prima facie evidence of the facts therein stated, and be admissible as evidence in any court in this state having jurisdiction, or in any manner empowered with the enforcement of the provisions of this act. Any employe or agent of any express company, railroad company or transportation company knowingly failing or refusing to comply with the provisions of this section, shall be guilty of a misdemeanor and punished by a fine of not less than fifty nor more than one hundred dollars

and may be imprisoned in the county jail not less than thirty days nor more than six months."

Sections 20, 21, 22, 23 and 24 contain provisions governing procedure which are not material here.

Section 25 repeals certain specified sections of the Acts of 1909 and all other acts and parts of acts inconsistent with the provisions of this act.

Section 26 provides that the act shall take effect July 1, 1914.

Taken by its four corners and read as a whole, in connection with the constitutional amendment, the law appears to be an ordinary prohibition law dealing only with the subject matter of the manufacture, sale and keeping for sale of liquors within the state of West Virginia and not with the subject matter of interstate transportation and delivery of liquors purchased in other states to consignees in West Virginia for personal use. The law does not contain any prohibition against carriers transporting and delivering interstate shipments of liquor as does the Kentucky statute, involved in *Adams Express Co. vs. Kentucky*, pending here, and No. 271, October Term, 1914. Carriers are exempted from the penal provisions of the West Virginia law and cannot commit any of the offenses defined in Section 3. Section 19 is the only section that creates an offense that can be committed by a common carrier or its agents, to-wit, the offense of failing to keep the records provided for in that section. A law of West Virginia which undertook to stop interstate traf-

fic in liquors for personal use would raise grave constitutional questions. If the legislature of West Virginia intended to enact a law of such doubtful validity it should have done so in clear and unmistakable terms. It is not the duty of the court to construe this law as one dealing with any other subject matter than that set forth in the title and provided for in the constitutional amendment, to-wit, "The manufacture, sale and keeping for sale" of liquors in West Virginia.

If a statute is reasonably susceptible of two interpretations, that one will be adopted by which the decision of grave constitutional questions is avoided.

United States vs. Delaware & Hudson Co., 213 U. S. 366.

C. N. O. & T. P. Ry. Co. vs. Kentucky, 115 U. S. 321.

Knights Templars, etc., vs. Jarman, 187 U. S. 197.

The same principle of construction is recognized by the highest court of West Virginia. In *Edgell vs. Conway*, 24 W. Va. 747, it was said:

"A court will not pass on the constitutionality of a statute, unless a decision on that very point is necessary to the determination of the case."

*State of West Virginia vs. Adams Express Co.*, 219 Fed. 794, was a bill in equity filed by the state in a state court to enjoin the Adams Express Company from delivering to consignees in West Virginia, liquors thereafter to be shipped into that state by one Beigel,

a resident of Cincinnati and the agent of the Pabst Brewing Company of Milwaukee, Wisconsin, "unless the consignees of any such liquors can show to the satisfaction of the defendant express company, its agents, representatives and employes, that he, without solicitation from said Beigel, or any of his agents, representatives, or employes, ordered the consignment of liquors for his personal, lawful use without having received from said Beigel or any of his agents, representatives or employes, advertisements or letters soliciting orders for liquors, or price-lists or order blanks advertising or soliciting from the consignee orders for liquors." The case was removed into the United States District Court for the Southern District of West Virginia by defendant Adams Express Company, where, upon argument, a temporary order of injunction of the state court was dissolved and the bill dismissed. On appeal by the state the Circuit Court of Appeals reversed this judgment upholding the contention of the state that the express company could not legally transport and deliver interstate shipments of liquor for personal use where the consignees had been "induced to order from Beigel by solicitation through circulars and price-lists, expressly forbidden and made criminal by section 8 of the statute," and that the fact that such "solicitation" was carried on by mail between Cincinnati, Ohio, and Charleston, West Virginia, was immaterial. The court held, however, that the relief by way of injunction was not dependent on the fact that the shipments there involved had originated

in orders which the consignees had been induced to make on account of solicitation by advertising through the mails; but that the state was entitled to enjoin the interstate transportation and delivery of all shipments for personal use under that part of section 3 of the West Virginia prohibition law, which provides:

“and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof if made by such carrier to the consignee, his agent or employe.”

**The West Virginia Law is not to be construed as dealing with the advertising through the mails of interstate sales for personal use.**

We contend that section 8 of the law which prohibits the advertising of the sale or keeping for sale of liquors, the circulation of price-lists and order blanks and the permitting of liquor advertisements to be maintained upon property, refers only to advertising the sale or keeping for sale of the liquors, the manufacture, sale and keeping for sale of which are forbidden in West Virginia; and that the section does not deal with the advertising of the sale or keeping for sale of liquors to be sold outside the state of West Virginia.

If it should be contended that that part of section 3 which makes it an offense “to solicit or receive orders for any liquors” is involved in this case, similar

considerations apply. The offense of soliciting or receiving orders under section 3 is only the soliciting and receiving orders for the sale of those liquors which the act prohibits from being manufactured or sold within the state. We suggest also that properly construed section 3 applies only to personal solicitation in the state and that this is shown by the blanket form of indictment provided in that section which permits the state to charge generally that the defendant "did unlawfully manufacture, sale, offer, keep, store and expose for sale and solicit and receive orders for liquors" in a particular county. That this is the construction is shown also by the juxtaposition in the statute and in the form of indictment of the words "sale or keep, store, offer or expose for sale, or solicit or receive orders." If the words "solicit or receive orders" are construed to mean solicitation by mail from a point outside the state and the reception for orders for liquors at such point by citizens of another state, these words are the only words in the section which are not confined to transactions within the state, because manifestly the state has not undertaken to punish the selling, keeping and storing of liquors at places outside the state. The state contends that section 3 or section 8, or both, made it an offense for the James Clark Distilling Company to send by mail from its place of business at Cumberland, Maryland, advertising matter and order blanks into West Virginia, although neither section makes any direct reference to such interstate communication carried on by United States mail. In *R.*

*M. Rose Co. vs. State*, 133 Ga. 353, 65 S. E. 770, the Supreme Court of Georgia held that under the commerce clause of the constitution, an indictment charging that defendant, who lived in Chattanooga, Tennessee, solicited orders for the sale of intoxicating liquors by a circular sent through the mails from Chattanooga to a person living in Georgia did not state an offense.

The construction of section 3 and 8 which we contend for is that which was adopted by the Supreme Court of Appeals of West Virginia in *State vs. Wheat*, 48 W. Va. 259, involving a statute similar in terms to the prohibition law involved in this case. Wheat was a licensed liquor dealer in Ohio County, West Virginia, and was indicted in Brooke County for mailing circulars to persons in Brooke County, where he had no license, under an Act of 1891, providing that no one without license shall "sell, offer for sale, or solicit or receive orders for spirituous liquors." The Supreme Court of West Virginia reversed a conviction, saying:

"It would seem immaterial that the law confines the license to do business at a particular place or one county, since the solicitation and receipt of orders are not for sale and delivery in other counties, but for sale to be executed as consummated contracts at the place and in the county designated in the license; that is the place of sale."

The court drew a distinction between that case and the case of *State vs. Swift*, 35 W. Va. 542, in which a conviction was sustained on the ground that the agent



of a licensee was personally present, receiving the order in a county where he had no license.

The court said:

"I cannot think that the statute designed to go so far as to prohibit one having a wholesale liquor license in Ohio County from advertising his business, by newspapers and circulars in other counties. Again, there may be question whether the offense was committed in Brooke County, as the circulars were left in the mail in Ohio County, and it may be said the act was there complete, etc."

In enacting the present law the legislature of West Virginia may be supposed to have had these decisions in mind. The principles of construction adopted in *State vs. Wheat*, are applicable to the present statute in support of the argument that it was not intended to prohibit a licensed dealer in Cumberland, Maryland, from advertising the sale of liquors there by newspapers and circulars mailed into West Virginia.

**The law should not be construed as undertaking to make the place of delivery in West Virginia of interstate shipments for personal use, the place of sale.**

In respect to that part of section 3 of the law which makes the place of delivery the place of sale and upon which the decision of the court below was based, we submit that this section was not intended to deal with the subject matter of selling liquors outside of West Virginia and their interstate transportation, but was merely intended to determine the place of sale

of a shipment between two points in the state of West Virginia, and to fix the venue of the offense. This construction is fortified by reading the portion of section 3 above quoted in connection with that part of section 3 which immediately follows it, wherein the form of indictment for the offense of sale, keeping for sale, etc., liquors in a particular county in West Virginia is provided for. To construe the law as affecting interstate sales would make it unconstitutional under *Adams Express Company vs. Kentucky*, 206 U. S. 129, where it was held, as shown by the syllabus:

“A statute of Kentucky, making penal all shipments of liquor ‘to be paid for on delivery, commonly called C.O.D. shipments,’ and further providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, is as applied to shipments from one state to another an attempt to regulate interstate commerce and beyond the power of the state.”

## II.

**THE STATUTE OF WEST VIRGINIA CANNOT CONSTITUTIONALLY MAKE IT AN OFFENSE FOR A LIQUOR DEALER AT CUMBERLAND, MARYLAND, TO SOLICIT BY MAIL ORDERS FROM CITIZENS OF WEST VIRGINIA FOR THE SALE OF LIQUORS AT CUMBERLAND AND THEIR TRANSPORTATION IN INTERSTATE COMMERCE.**

Assuming for the sake of argument that it was the intention of the West Virginia statute to make it an offense for the James Clark Distilling Company to mail its circulars at Cumberland and have them carried into West Virginia, and assuming for the sake of argument that the effect of a violation of this provision of the West Virginia law is to deprive the distilling company of its rights to make shipments in interstate commerce in pursuance of orders received by such solicitation, such results cannot follow because the statute so construed would be unconstitutional. The only case directly in point is *Rose vs. State*, 133 Ga. 353, which so holds. *Delamater vs. South Dakota*, 205 U. S. 93, involved the personal solicitation in the state of South Dakota of orders for the interstate sale of liquors and is not in point. The Supreme Court of Georgia had the *Delamater* case before it when *Rose vs. State* was decided, and said in regard to that case:

“This decision was declared to have been authorized ‘by the spirit of the Wilson Act.’ But would it be contended for a moment that,

under either the letter or the spirit of that act, if Delamater had never gone into the state of South Dakota at all, but had written and posted in Minnesota a letter offering liquor for sale there, he would have been subject to the police laws of South Dakota, so as to be required by its authorities to take out a license authorizing him to write and mail letters in Minnesota? If he had not done so, could he have been indicted and extradited from Minnesota because he wrote and mailed letters there without a license from South Dakota? To ask the question is to answer it. The Delamater case is no authority for holding that one state can require a resident and citizen of another state to obtain a license to write in the latter state and send through the United States mail letters relating to what is still held to be a subject of commerce, and therefore, between the states, of interstate commerce."

The distinction between personal solicitation of orders and solicitation by United States mail is clear and was noticed by the Supreme Court of Georgia in *Kirkpatrick vs. State*, 138 Ga. 794, 76 S. E. 53, which was a prosecution against an agent of a non-resident liquor dealer for personally soliciting orders in the state of Georgia for the sale of intoxicating liquors to be shipped into that state. The court held that the Georgia statute making such solicitation an offense was valid under the decision in *Delamater vs. South Dakota*. The court referred to *Rose vs. State*, 133 Ga. 353, saying:

“Nothing here ruled is in conflict with any ruling made in the *Rose* case, nor is there anything in the *Rose* case holding that the doctrine of the *Delamater* case would be irrelevant to the present. The *Rose* case was not one in which the agent came personally into this state and solicited orders, but was one in which orders were solicited by letters sent in the United States mail, posted beyond the limits of this state, and at a place where it was lawful to sell intoxicating liquors. The ruling there made distinctly recognized that made in the *Demamater* case, but held it inapplicable to the facts of that case. The distinction there made is not applicable in the present case, the agent being personally in this state soliciting orders.”

*Hayner vs. State*, 83 Ohio St. 178, and *Zinn vs. State*, 88 Ark. 273, 114 S. W. 227, involved the solicitation of orders for the sale of liquors by mail where the whole transaction occurred within the limits of the state and where the shipments proposed were intrastate shipments. No federal question was involved in those cases except the question whether the state law was in violation of that part of article I. of section 8 of the constitution which empowers Congress to establish postoffices and post roads.

*Maine vs. Bass Publishing Co.*, 104 Me. 288, was a proceeding against the publisher of a newspaper in the city of Bangor, Maine, for publishing advertisements there of liquors for sale in Boston, Massachusetts. The publication of such advertisements is an act com-

mitted wholly within the confines of a state and the principles governing such a case are analogous to those enforced in *Delamater vs. South Dakota* where an individual does, within the state, an act forbidden by a state law. The case did not involve any question of the use of the United States mails in interstate commerce.

The Circuit Court of Appeals in *State of West Virginia vs. Adams Express Co.*, 219 Fed. 794, referred to *In re Palliser*, 136 U. S. 257, and *United States vs. Thayer*, 209 U. S. 39. These cases are not in point.

*In re Palliser* was an indictment in a District Court of the United States on the charge of offering to pay money to an officer of the United States with intent to influence him to commit an act in violation of his public duties. The offer was made by the mailing of a letter at New York addressed to the postmaster in New London, Connecticut. Defendant claimed that the evidence showed no offense within the jurisdiction of the courts of the United States for the district of Connecticut. The court held that the District Court of the United States for the District of Connecticut had jurisdiction of the offense. That case involved merely the power of Congress under the constitution to fix the venue of an offense against the laws of the United States. It did not involve as does this case, any question of the power of a state to make it an offense to use the United States mail in connection with an interstate commerce transaction.

United States vs. Thayer held that a charge of soliciting a contribution of money for political purposes from an employe of the United States in a postoffice building of the United States in violation of the civil service act was sustained by evidence that defendant had addressed a letter soliciting such contribution and that the same was delivered by United States mail to an employe of the government within a postoffice building. This case establishes that solicitation in violation of the United States statute may as well be committed by writing a letter as in person. The case does not involve any question of the power of a state to deal with the solicitation by mail of orders for shipments to be made in interstate commerce.

There is nothing in the Webb-Kenyon Law which authorizes the state of West Virginia to penalize a citizen of Maryland for writing in that state and mailing into West Virginia a proposal to sell and ship liquors for personal use. The Webb-Kenyon Law deals with the transportation only of liquors intended to be used for certain purposes, and not with the solicitation of orders for liquors to be transported.



## III.

**THE STATUTE OF WEST VIRGINIA CANNOT CONSTITUTIONALLY MAKE THE PLACE OF DELIVERY IN WEST VIRGINIA, OF AN INTER-STATE SHIPMENT FOR PERSONAL USE, THE PLACE OF SALE, AND PROHIBIT THE INTER-STATE CARRIER FROM DELIVERING SUCH SHIPMENTS.**

Such a state statute is a direct interference with interstate commerce in violation of the commerce clause of the constitution. Under the decisions of the court in *Adams Express Co. vs. Kentucky*, 206 U. S. 129, and in *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.*, 223 U. S. 70, it must be conceded that the West Virginia statute is unconstitutional, unless it is given validity by the act of Congress of March 1, 1913, known as the Webb-Kenyon Law. Both of the cases above cited involved a Kentucky statute which undertook to make the place of delivery of an interstate shipment the place of sale, and to punish the carrier for delivering such shipments in dry territory in Kentucky. In *Adams Express Co. vs. Kentucky*, 206 U. S. 129, the court reversed a judgment of conviction against an agent of the express company for violating this statute. In *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.*, 223 U. S. 70, the court held that the prohibitions of this statute furnished no valid reason for a refusal by the railroad company to carry the brewing company's shipments from Indiana to consignees in dry territory in Kentucky.

## IV.

**A CITIZEN OF WEST VIRGINIA HAS THE CONSTITUTIONAL RIGHT TO ORDER AND HAVE DELIVERED TO HIM, IN INTERSTATE COMMERCE, LIQUORS FOR HIS PERSONAL USE.**

State vs. Gilman, 33 W. Va. 146, 10 S. E. 283, was an indictment charging that defendant did unlawfully, and without a license therefor, "sell, offer, and expose for sale, and solicit and receive orders for and keep in his possession for another, spirituous liquors, wine, porter, ale, beer and drink of a like nature, etc." On demurrer to the indictment the Supreme Court of Appeals of West Virginia held the statute unconstitutional under the constitution of West Virginia and also held it in contravention of the Fourteenth Amendment of the Constitution of the United States, in that it undertook to make it an offense for the citizen to keep liquors in his possession for another. The court said:

"The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals or safety of the public, and, therefore, the statute prohibiting such keeping in possession is not a legitimate exercise of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification and therefore void."

To the same effect are:

State vs. Williams, 146 N. C. 618, 61 S. E. 61.

Eidge vs. Bessemer, 164 Ala. 599, 51 Sou. 246.

Commonwealth vs. Campbell, 133 Ky. 50.

Martin vs. Commonwealth, 153 Ky. 784.

Calhoun vs. Commonwealth, 154 Ky. 70.

Adams Express Co. vs. Commonwealth, 154 Ky. 471.

Commonwealth vs. Smith, 163 Ky. 227.

In the last mentioned case the court of Appeals of Kentucky had under consideration an act of the legislature approved March 9, 1914, providing that in prohibited territory it should be unlawful for any person "to keep, store or possess any such liquors in any room, building, or structure other than the private residence of such person." This statute was held unconstitutional as exceeding the authority of the legislature by prohibiting the possession of liquors for an innocent purpose with which the police power of the state is not concerned. At p. 234 the court uses the following language:

"The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to

enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the question. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution. *State vs. Williams*, supra; *Mugler vs. Kansas*, 123 U. S. 623, 31 L. Ed. 205. We have in force a statute prohibiting the possession of intoxicating liquor in prohibited territory for the purpose of sale. Under this statute very slight evidence is sufficient to secure a conviction. Where, therefore, the purpose of the owner is unlawful, the above statute is effective. Here it is sought to go one step further and make the possession for an innocent purpose considered from the standpoint of the police power as much of an offense as if the possession were for an unlawful purpose. Manifestly, if the legislature has the power to prohibit such possession at places other than one's private residence, then it has the like power to prohibit such possession even at a private residence, and this is exactly what was held in *Commonwealth vs. Campbell*, supra, could not be done. There must of necessity be limits beyond which the legislature cannot rightfully go. We think that limit is reached when it prohibits such possession for sale or other unlawful purpose. It cannot go further and prohibit such possession or limit the place of possession where

the liquors are intended for one's own use, and, therefore, for a purpose with which the police power of the state is not concerned. It will not do to say that because some persons may evade the law as it now exists, others who have no intention of violating the law should be denied their constitutional rights. As this is the effect of section 4 of the act in question, we concur in the ruling of the circuit judge that the section is unconstitutional and void."

In this connection the language of Mr. Justice White, delivering the opinion in *Vance vs. Vandercook* (1), 170 U. S. 439 (1898), is important. At p. 455 he said:

"On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States."

## V.

**THE WEBB-KENYON LAW DOES NOT  
AUTHORIZE THE APPLICATION OF A STATE  
STATUTE TO AN INTERSTATE SHIPMENT FOR  
LAWFUL, PERSONAL USE.**

The law, after having been returned to the Senate by President Taft, with objections thereto, was enacted March 1, 1913, as Ch. 90, 37 Stat. 699. The opinion of the Supreme Court of Delaware in *VanWinkle vs. State*, 91 Atl. 385 (June 16, 1914), gives the history of the law during its consideration by Congress. It reads:

**An Act Divesting Intoxicating Liquors of  
Their Interstate Character in Certain Cases.**

“Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in viola-

tion of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The United States Circuit Court of Appeals for the Fourth Circuit in *State of West Virginia vs. Adams Express Company*, 219 Fed. 794 (R. 45), considered it so clear that under the Webb-Kenyon Law a state had power to prohibit the interstate transportation of liquors for personal use, that the interpretation of the law permitted no resort to extraneous sources. On the other hand, the Supreme Court of Delaware in *VanWinkle vs. State*, 91 Atl. 385, did not consider it proper to refer to the debates in Congress, because the law was so clear the other way. In *Adams Express Company vs. Commonwealth*, 160 Ky. 66, 169 S. W. 603 (October 6, 1914), the Court of Appeals of Kentucky referred to the debates as a proper source of information in construing the law. This difference of opinion justifies us in calling the attention of the court to what was said in Congress on the subject of shipments for personal use.

If there is any doubt as to the construction or application of a statute, contemporary history which shows the evils intended to be remedied may be referred to by the courts.

*Johnson vs. Southern Pacific Ry. Co.* 196 U. S. 19.

*Anderson Net & Twine Co. vs. Worthington*, 141 U. S. 468.



Holy Trinity Church vs. United States, 143 U. S. 457.

Dunlap vs. United States, 173 U. S. 65.

Downes vs. Bidwell, 182 U. S. 244.

The debates that took place in Congress and before the Judiciary Committee of both the House and the Senate, made it very plain that it was not the intention of the proponents of the Webb-Kenyon Bill to prevent the individual from getting liquor for his personal use.

At the hearings before the Committee of the Judiciary (Sub-Committee 3) on January 11th, 1912, Honorable E. Y. Webb of North Carolina, one of the authors of the bill, in response to the question of the other members of the committee said that the only purpose of the bill was to prevent the re-sale of liquor in prohibition territory by the consignee, and further says that, "This is the sole purpose of this bill" (pp. 9, 10).

On page 11 of the same document appears the full statement of Mr. Carlin, chairman of the Sub-Committee, and Mr. Webb, as follows:

**Mr. Carlin:**

"The purpose of the bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal."

**Mr. Webb:**

"Yes, sir; that is the object. This bill has been criticized by some of our temperance friends, because it does not undertake to pro-

hibit the shipment of whisky for individual use. As long as the Supreme Court holds that liquor is a legitimate subject of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whisky; I do not think a law will be passed prohibiting the shipment of whisky for a man's personal use."

On page 13, Mr. Webb says:

"This bill does not in anywise affect the right of a man to buy whisky for his personal use."

On page 26 appears the statement of the Reverend Edwin C. Dinwiddie, Washington Representative of The Anti-Saloon League of America, who was the most active and aggressive worker in behalf of the bill, as follows:

"This bill of itself interferes with no man's rights to import intoxicating liquors for the purpose of personal consumption."

At p. 28, he says:

"If they are there for a lawful purpose . . . . that is, for personal or family use and not to be used in violation of any state law . . . nobody wants to interfere with these liquors and nobody proposes to interfere with them."

At page 33, he says:

"A man can have liquor shipped in and delivered at his residence for his personal use."

On page 2851 of the Congressional Record, February 8th, 1913, Mr. Roddenbery, a supporter of the bill says:

"It does not interfere with the shipment or reception of liquors for lawful, personal consumption or for any purpose not prohibited by state law."

On December 19th, 1912, page 865, Congressional record, Senator William S. Kenyon says:

"This bill, if enacted, would not be a law to bring about prohibition. It would not be a law to stop personal use of intoxicating liquors nor to prohibit the shipment of intoxicating liquors for personal use, nor to stop the use of intoxicating liquors for sacramental purposes."

He said further:

"There is no purpose in this bill, and the language can not be distorted into the idea so freely circulated in the literature now being distributed by those opposed to this bill, that it destroys the right of a man to the personal use of intoxicating liquor" (Cong. Rec., Dec. 19, 1912, p. 865).

"If liquors are shipped with the intent to be used by the person for his own personal use, and in no way to violate the law of a state, then they are subjects of commerce" (Cong. Rec., Dec. 19, 1912, p. 869).

"There is no practical trouble with the personal use question. There is no attempt on the part of anybody to construct a law that shall prevent personal use or prevent shipment for personal use, and this bill does not do so" (Cong. Rec., Dec. 19, 1912, p. 874).

In the course of the speech in opposition to the bill

of Hon. Thos. H. Paynter of Kentucky in the Senate on February 7, 1913, Senator Kenyon said:

"I do not want to interfere with the orderly course of the Senator's argument, but the statement which the Senator makes that this bill will stop the purchase of liquor for personal use is one that has been made a great deal and one which I absolutely deny."

Assuming that the West Virginia statute, properly construed, intended to authorize the state to stop the importation of liquors for the personal use of a citizen who had ordered them as the result of solicitation through the mails, and assuming that the West Virginia statute undertakes to make the place of delivery in West Virginia of interstate shipments for personal use the place of sale, the state derives no authority from the Webb-Kenyon Law to so interfere with interstate commerce. The Webb-Kenyon Law does not undertake to give the statutes of a state extra-territorial effect or to permit a state to make an innocent and lawful act done in another state an offense against its laws. There is nothing in the Act of Congress which forbids the transportation of liquors in interstate commerce, or permits the state law to apply, unless the use intended to be made of the liquors at destination is one that violates a valid law of the state. Congress has not undertaken to prohibit interstate transportation in cases where the state forbids interstate transportation on the ground that the transportation was preceded by the solicitation of an order.

Nor has congress forbidden the interstate transportation in cases where the state prevents the interstate transportation by making the delivery at destination an offense.

To construe the Webb-Kenyon Law as forbidding interstate transportation when the consignee does not intend to use the liquors in violation of a valid law of the state, is not only contrary to the plain wording of the law, but attributes to Congress an intention to surrender to the states the power to regulate commerce, which the people delegated to Congress by the constitution. Supposing that Congress may surrender such power to the states as to liquors intended to be used in violation of a state law, it is quite another thing to say that Congress assumed to surrender that power as to liquors not to be used in violation of a state law.

In *Adams Express Co. vs. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 343, (June 17, 1913), it was contended that by reason of the enactment of the Webb-Kenyon Law, Section 2569 a, Kentucky Statutes, applied to interstate shipments. The Court of Appeals denied this contention and reversed the conviction, holding that the Webb-Kenyon Law permitted the application of the state statute to the interstate transaction only where the consignee intended to use the liquors illegally after delivery, and that it did not permit the application of the state statute forbidding the transportation, and making the place of delivery the place of sale, to interstate shipments of liquor intended for personal use.

After referring to the evidence which showed that the consignee intended to use the liquors personally the court said:

“This being the purpose for which the liquor was intended to be received, possessed, and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. *Calhoun vs. Commonwealth*, 154 Ky. 70, 156 S. W. 1077; *Martin vs. Commonwealth*, 153 Ky. 784, 156 S. W. 870; *Commonwealth vs. Campbell*, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172.”

The court said further:

“It is, however, insisted for the commonwealth that, although the consignee of the whisky in this case may have received it for a lawful purpose, it was nevertheless a violation of law for the carrier to deliver it to him. The argument in this behalf being that as section 2569 a makes it unlawful for a carrier to bring into or deliver in local option territory any intoxicating liquors, subject to the exception mentioned in the section, the fact that the person to whom the liquor is delivered intends to possess and use it lawfully, does not excuse the carrier from doing a thing that is forbidden by the law of the state as expressed in this section.

This argument being rested on the proposition that, as it would be unlawful for a carrier, as an intrastate transaction, to deliver this liquor, the Webb-Kenyon Law makes the delivery of it by the carrier unlawful, although it be an interstate transaction, as both interstate and intrastate shipments are now on the same footing and are to be treated precisely alike. In short, it is said that in every case in which it would be unlawful for a common carrier to receive for shipment liquor at a point in this state where it might be sold, and carry and deliver it to the consignee at a point in this state where its sale was prohibited, it would also be unlawful for a common carrier to receive it for shipment at a point outside of the state and deliver it to the consignee at a point in this state where the sale of liquor was prohibited. We do not, however, agree with counsel for the commonwealth in this broad statement of the effect of the Webb-Kenyon Law. There is the same distinction now that there was before the enactment of this law between intrastate and interstate shipments of liquor, except when the interstate shipments come within the prohibition of the Webb-Kenyon law. It does not follow that because it would be unlawful for a carrier to deliver liquor as an intrastate transaction that it would also be unlawful for it to deliver, under like circumstances, liquor as an interstate transaction. For example, we held in *Adams Express Co. vs. Commonwealth*, 129 Ky. 420, 112 S. W. 577, 33 Ky. Law Rep. 967, 18 L. R. A. (N. S.) 1182, that



under section 2569 a a common carrier was forbidden to carry liquor from a point in this state at which it might be lawfully purchased to a point in the state where the local option law was in force and there deliver it to the consignee; and the validity of this statute as applied to intrastate transactions was recognized by the Supreme Court of the United States in the Cook Brewing Co. Case. But we have also held in *C. N. O. & T. P. Ry. Co. vs. Commonwealth*, 126 Ky. 563, 104 S. W. 394, 31 Ky. Law Rep. 954, and many other cases, as did the Supreme Court in the Cook Brewing Co. Case, that section 2569 a was inoperative when attempted to be applied, under like circumstances, to interstate transactions.

It therefore appears that the issue in this case really comes down to this: Was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the constitution and laws of the state, and the opinions of this court, that it was not. This being true, the aid of the Webb-Kenyon Law cannot be invoked to secure the punishment of the carrier, as it does not prohibit a common carrier from receiving, carrying and delivering, as an interstate transaction, intoxicating liquor to the consignee when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the laws of this state, or withhold

from such a transaction the protection afforded by the commerce clause of the federal constitution. As to this character of transaction, the Webb-Kenyon Law has no application, and having no application, the law, as it existed before the enactment of this legislation, is in force, and, being in force, the carrier cannot be punished for receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of this state."

In *Adams Express Company vs. Commonwealth*, 160 Ky. 66, 169 S. W. 603 (October 6, 1914), the same court affirmed this rule, saying:

"Unless the liquor is intended by some person interested therein to be received, possessed, sold or used in violation of the law of the state, the act does not apply to it. We accordingly held in *Adams Express Company vs. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342, that the act does not apply to shipments of whisky from another State into this State, where the consignee gets it simply for his personal use, there being no law of this State making it unlawful for a person to receive or possess intoxicants in this State for his own personal use. That decision followed the plain language of the act, as well as the express construction put upon it by Mr. Webb and Senator Kenyon in their speeches in advocacy of it on

the floor of Congress; and the same view has been taken so far as we are advised by all the courts of last resort, before whom the question has been presented. *Atkinson vs. Southern Express Co.*, 94 S. C. 444, 78 S. E. 516, 520, 48 L. R. A. (N. S.) 349; *Palmer vs. Southern Express Co.* (Tenn.) 165 S. W. 236; *VanWinkle vs. State of Delaware* (Del.) 91 Atl. 385."

In *VanWinkle vs. State of Delaware*, 91 Atl. 385 (June 16, 1914), in the Supreme Court of Delaware, not yet officially reported, overruling *State vs. Grier*, 88 Atl. 579 (Court of General Sessions of Delaware; October 8, 1913), the opinion by Judge Woolley, now United States Circuit Judge for the Third Circuit, shows that an agent of Adams Express Company was convicted under the "Hazel Law" of Delaware, for delivering a shipment of liquor in dry territory in Delaware, which had been purchased by the consignee in Philadelphia for his personal use. The "Hazel Law" was enacted after the passage of the Webb-Kenyon Law, and for the purpose of permitting the state to take advantage of the supposed jurisdiction conferred on the states as to interstate shipments by the Webb-Kenyon Law. The Hazel Law provided in Section 1:

"That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier or agent, handle, deliver or distribute in local option territory, any spirituous, vinous or

malt liquor, regardless of the name by which it may be called."

Judge Woolley in an elaborate opinion reviewed the whole history of the subject, including the history of the Webb-Kenyon Law, as to which he said:

"The Webb-Kenyon Bill, after its introduction, was subjected to vigorous debate and important amendment, with the result that the popular impression of that legislation has been gathered more from the controversy that revolved about it than from knowledge of the measure itself. It is not unnatural, therefore, that the popular conception of the law is that it confers upon a state the power absolutely and totally to prohibit the importation of liquor for any purpose, while an examination of the precise terms of the law shows a very different purpose and a very different power."

At 91 Atl., p. 398, he said:

"Under this state of the law, the first question therefore is: How far and to what extent are the prohibitions of the Hazel Act authorized, aided or validated by the Webb-Kenyon Law, when considered with especial reference to the offense for which the defendant below was indicted? The defendant below, acting as an agent for a common carrier, completed a shipment of liquor from the state of Pennsylvania to a prohibition district in the state of Delaware, by receiving the same and delivering it to the consignee in that district. It is admitted in the case stated that the liquor 'was intended' by the consignee 'to be used by him for his own

consumption,' and 'he did not intend to sell or otherwise unlawfully dispose of the same.' The Hazel Act prohibits the shipment of liquor into the prohibition districts of this state for any purpose (excepting the two designated), whether the liquor be intended to be used in violation of law or not. The Webb-Kenyon Law prohibits the shipment of liquor only when the liquor is intended to be used in violation of the law of the state. **There is thus presented a case of a shipment of liquor for a lawful purpose, in violation of a state statute prohibiting the shipment of liquor for any purpose, enacted under authority of a federal statute, prohibiting the shipment of liquor for an unlawful purpose.** The first question for our determination, therefore, is whether the Webb-Kenyon Law prohibits the act with which the defendant below is charged, or makes valid the prohibition of such an act by a state statute. In other words, does the Webb-Kenyon Law apply to this case, and, if not, is the Hazel Law valid in so far as it prohibits the act committed by the defendant below?

The conclusion reached by the court is stated at p. 405 as follows:

"But by the Webb-Kenyon Act, Congress expressed its sanction to such a law as the state of Delaware might desire to enact, prohibiting the shipment of liquor from other states into certain districts of this state when it was there to be received, possessed, sold or used in violation of the law of this state. Upon authority of

this act the state of Delaware enacted the Hazel Law prohibiting with like intent the shipment of liquor from other states into prohibition districts of this state, there to be used for unlawful purposes. To this extent the Hazel Law is valid, if the Webb-Kenyon Law is valid. But the state of Delaware went further and by the same law prohibited the shipment of liquor from other states into prohibition districts of this state there to be used for purposes recognized by the act itself to be lawful. For this much of the Hazel Law the state of Delaware was without authority of its own and without the aid of the Webb-Kenyon Act, for the Webb-Kenyon Act did not prohibit, nor did it authorize a state to prohibit, the importation of liquor into a prohibition territory, when the liquor was intended for a lawful purpose. The Hazel Act, therefore, in so far as it prohibits the shipment of liquor from another state into a prohibition district of this state, when the liquor is not intended to be received, possessed, sold or in any manner used in violation of the laws of this state, but is intended for a lawful purpose, is an enactment without constitutional authority, and when invoked in such cases, amounts to an interference with interstate commerce, and is therefore void."

Palmer vs. Southern Express Co., 165 S. W. 236 (February 28, 1914), in the Supreme Court of Tennessee, not yet officially reported, was an action in replevin by Palmer against the express company to compel it to deliver to him at the office of the express com-

pany in Davidson County, Tennessee, a shipment of 15 gallons of liquors which he had purchased at Louisville, Kentucky, for his personal use. By an act of the legislature of Tennessee passed subsequent to the Webb-Kenyon Law it was unlawful;

“for any person, firm or corporation to ship, carry, transport, or convey any intoxicating liquor into this state, or from one point to another within this state, for the purpose of delivery, or to deliver the same to any person, firm, company, or corporation within the state, except . . . . That nothing in this act shall make it unlawful; . . . .

2. For any person to order and have shipped and delivered to him from without the state, for his own use, or the use of the members of his family residing with him, such intoxicating liquor in quantities not exceeding one gallon.”

The Supreme Court of Tennessee held that this provision of the Tennessee statute was in contravention of the commerce clause of the Constitution of the United States and was not authorized by the Webb-Kenyon Law. The court after stating that the opinion was not to be misunderstood as holding the Webb-Kenyon Law inapplicable to “sales of liquor made in a foreign state for shipment into this state to be sold or used in violation of the prohibition laws of this state,” said, at p. 244:

“It is perceived that the thing which the act prohibits is the interstate shipment or transportation of the liquors mentioned therein, when



intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state, etc., into which the shipment is made.

It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold, or used in violation of any law of the state; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill, confessed by the demurrer, and agreed to on the record at the hearing in the court below, that the liquors were purchased for the personal use of complainant and his family. This was a lawful use, and indeed permitted by the statute in question."

In *Hamm Brewing Co. vs. Chicago R. I. & P. Ry. Co.* 215 Fed. 672 (1913), District Judge Willard, by mandatory injunction compelled defendant to carry plaintiff's shipments of beer from Minnesota into the state of Iowa. He said:

"The beer which Moss, a resident of Iowa, ordered from the plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa. The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-

Kenyon Law, while it says that the liquor must not be received, possessed, sold or used in violation of law, does not say that it shall not be transported in violation of law. If it had been the intention of Congress to prohibit the procurement from points outside the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments."

Ex parte Peede, 170 S. W. 749 (Court of Criminal Appeals of Texas, October 14, 1914; on motion for rehearing, November 18, 1914), was a prosecution of an agent of Wells Fargo Express Company for violation of the Allison Law of Texas, which, as contended by the state, made it an offense for a carrier to deliver interstate shipments of liquor in dry territory in Texas for the personal use of the consignee. In an exhaustive opinion the majority of the court use the following language in reference to the Webb-Kenyon Law:

"It is thus seen that Congress, although it had the right to do so, does not prohibit, nor authorize the states to prohibit, interstate shipments of intoxicating liquor, but only prohibits the interstate shipment when intended to be received or possessed to be sold or used in violation of a law of the state. It removed the protecting arm of the interstate commerce clause of the federal constitution thus far and no further, and to hold otherwise, in our opinion, would render, under the decisions of the Supreme Court of the United States, section 5 of

the Allison Law violative of the interstate commerce clause of the Constitution of the United States, and open wide the door to the interstate shipment of intoxicating liquors for both legal and illegal purposes. Congress closed, and authorized the state to close, the door to interstate shipments when such liquors are intended for sale in violation of the law of the state, or to be in any manner used in violation of a law of the state. Thus far Congress saw proper to go and no further. This is made manifest by the remarks of Mr. Webb, the author of the bill, when it was pending in Congress. While considering the bill the following colloquy took place:

‘Mr. Carlin. The purpose of this bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal?’

Mr. Webb. Yes, sir; that is the object. The bill has been criticized by some of our temperance friends because it does not undertake to prohibit the whisky for individual use. As long as our Supreme Court holds that liquor is a legitimate subject of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whisky, I do not think a law will be passed prohibiting the shipment of whisky for a man’s personal use.’

If the language of the bill was obscure or ambiguous this would be material in construing it. But the language is plain and unambiguous, and that the author used the language he did intentionally and he had not sought, and did not

intend to prohibit interstate shipment of intoxicating liquors when intended for one's own use, but only when intended to be sold or used in violation of the law in prohibition territory, is manifest."

On motion for rehearing the court adopted as its opinion the opinion of the Supreme Court of Delaware in *VanWinkle vs. State*, saying that that case "reviews the history of this character of litigation and disposes of every question raised by the state on the motion for rehearing."

*Southern Express Co. vs. State*, 66 So. 115 (Supreme Court of Alabama, June 30, 1914), was a bill in equity by the state to enjoin the maintenance of the company's warehouses in Morgan County, Alabama, as a liquor nuisance. The Supreme Court reversed a decree of the lower court allowing an injunction. The court holds that no law of the State of Alabama prevents or can, under the Webb-Kenyon Law, prevent the delivery by a carrier of liquors intended for personal use, and that the only ground upon which an injunction against the carrier would be justified would be that the liquors were intended for illegal sale and the carrier has knowledge of that fact. The court said (66 So. 124):

"In so far as this state is concerned, its laws have no effect upon liquors brought into this state from another state unless, in contravention of the Act of Congress, the carrier has them in its possession for the purpose of delivery or undertakes to deliver them for illegal use in the

state. The laws of this state have no extra-territorial force, and the Webb Bill was not intended to give to our laws any such force. The state of Alabama has nothing to do with sales that may be made in another state. It is, however, interested in the question as to whether a carrier of interstate commerce shall deliver to a consignee in this state an article which the consignee intends to use in this state in violation of a valid state law. The true legal effect of the Webb Bill, construed in connection with our prohibitory statutes, is to prohibit a carrier engaged in interstate commerce from delivering or having in its possession, for the purposes of delivery to a consignee, liquor which has come into its hands and which the consignee intends to use in violation of our laws."

*Southern Express Co. vs. City of High Point*, 83 S. E. 254 (Supreme Court of North Carolina, October 28, 1914), was an action for injunction by the Southern Express Company against the city officials of High Point to restrain them from enforcing an ordinance of that city against a delivery of interstate shipments of liquor in the city by the express company. The bill was dismissed, the court holding that there was no necessity for a remedy by injunction because "in any prosecution of an indictment under this act, it is a valid defense that the liquor was intended for a lawful purpose, and therefore the courts will not undertake to determine upon injunction proceedings whether shipments of liquor are intended for an illegal or a legal purpose."

In *Bristol Distributing Co. vs. Southern Express Company* (Supreme Court of Appeals of Virginia, January 12, 1915), not yet reported, the court held that the Bristol Distributing Company, a licensed liquor dealer in Virginia, was entitled to a mandatory injunction against Southern Express Company to compel that company to receive at Bristol, Virginia, shipments of intoxicating liquors destined to points in the state of North Carolina for the personal use of the consignees. The decision was based upon the decision of the North Carolina court in *Southern Express Company vs. High Point*, to the effect that it being no violation of the law of North Carolina for a carrier to transport and deliver shipments for personal use in that state, such shipments are not prohibited by the Webb-Kenyon Law.

*State of West Virginia vs. Adams Express Co.* 219 Fed. 331 (Dist. Court, Western District of W. Va., October 19, 1914), was a suit in equity by the state in one of its own courts to enjoin the Adams Express Company from delivering liquors ordered by a citizen of West Virginia for his own personal use from a licensed wholesale dealer outside the state. The Adams Express Company removed the case to the Federal Court, where it was held, as shown by the opinion of District Judge Keller, that;

“Hence there is nothing in either the Wilson Act or the Webb-Kenyon Act which authorized the state to interfere with the shipment and delivery of liquors ordered by a citizen of West

Virginia for his own personal use from a licensed wholesale dealer without the state, and it follows that the preliminary injunction awarded by the Circuit Court of Kanawha County should be dissolved and the bill dismissed. I wish it understood that this ruling is made strictly upon the case before me, and has no reference to what might be the duties or obligations of the transportation company in the case of a consignment of liquor intended by the consignee to be resold or used in violation of the laws of West Virginia."

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, in State of West Virginia, appellant, vs. Adams Express Co., 219 Fed. 794, decided January 13, 1915 (opinion printed at R. 45), this decision was reversed.

In the court below the district judge said (R. 38):

"There is nothing in the act, however, to indicate that the state had any objection to any one obtaining liquor for his own personal use provided he can do so otherwise than by, within the state, buying or making it," and that, "it follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by any one interested therein to be received, possessed, or used in violation of any law of that state."

The conclusion of the court on this point is stated as follows:

"In this case nothing need be decided other than that the defendant as a common carrier is



bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the state. It has no right to accept for shipment, or to deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that state."

The foregoing cases in the highest courts of Kentucky, Delaware, Tennessee, Texas, Alabama, North Carolina and Virginia, and elsewhere, agree that the Webb-Kenyon Law undertakes to confer on the states no power to interfere with the interstate transportation and delivery of liquors intended by the consignee for lawful, personal use.

On the other hand it is held that where the consignee intends to sell the imported liquors in violation of the law of the destination state, the Webb-Kenyon Law authorized the application of the state law to the interstate shipment.

State vs. United States Express Co., 145 N. W. 451 (Supreme Court of Iowa, February 17, 1914), was an injunction on behalf of the state abating as a nuisance the office of the express company at the city of Ottumwa, Iowa, on the ground that it was delivering interstate shipments of liquor to consignees for purposes of illegal sale, of which fact the company's agent at Ottumwa had notice.

The court found that the consignee of said liquors;

“was the sole person interested therein, and he intended, all of the time, to receive and possess with intent to sell the beer and liquors in Ottumwa, in violation of the laws of the State of Iowa. . . . The defendant at the time of the delivery of the beer and the liquors to J. Erbacher did not have notice or actual knowledge that he was buying or receiving the same with the intent and purpose of selling it in violation of law, but was in possession of such facts, that upon reasonable inquiry, it would have ascertained he was buying and receiving and holding the beer and liquor with intent to sell the same in violation of the laws of Iowa, and is therefore chargeable with such knowledge” (145 N. W. 453).

At p. 455, the court said:

“Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act. It does just what the title says it was intended to do, to-wit, divests intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the act itself. That is to say, the shipment or transportation of intoxicating liquor from one state to another, when such shipment is intended by any person interested therein to be received, sold, or used in violation of any law of such state (to which the shipment is made), is prohibited. This is the sum and

substance of the act, and that it has reference to such shipments as are involved in this case clearly appears."

State vs. Doe, 92 Kan. 212, 139 Pac. 1169 (April 11, 1914), was a similar case. It involved a seizure and condemnation under a Kansas statute of a car-load of beer destined to a consignee "engaged in the wholesale liquor business in Cherokee County in violation of law." The first syllabus, by the court, reads:

"The Webb-Kenyon Act, Prohibiting the Shipping of Intoxicating Liquors into States for Use in Violation of Law, is Constitutional and Valid. Under the Act of Congress of March 1, 1913, entitled 'An act divesting intoxicating liquors of their interstate character in certain cases' (Part 1, 37 U. S. Statutes at Large, Ch. 90, p. 699), intoxicating liquors are recognized as legitimate subjects of interstate commerce only when not intended for sale or use in violation of the laws of the destination state, and the fact that a car-load of intoxicating liquors, seized in bulk at the place in this state to which it was consigned, was still in course of transportation, originating in another state, did not protect the liquor from condemnation consequent upon a judicial determination regularly made that it was intended for unlawful use in Kansas."

Smith vs. Southern Express Co., 82 S. E. 15 (Supreme Court of North Carolina, May 30, 1914), was an action to recover a penalty from the carrier under a statute for refusal to deliver to plaintiff as consignee

an interstate shipment of liquor. The scope of the opinion is indicated by the following statement appearing at p. 17:

"It thus appears that he (the plaintiff) has no valid license permitting him to sell either as druggist or otherwise, and, it being his avowed intention to sell for profit and by the way of prescription, an act made a misdemeanor by the statute unless a valid license is first obtained, the court will not aid him to this intended breach of the criminal law, nor should it penalize one who, knowing the facts, has declined to deliver the liquor in furtherance of his unlawful purpose."

In order to make the list of cases on the subject complete we refer to two cases in which the Webb-Kenyon Law was discussed in the opinion, but which determine no question bearing on the present case;

*Atkinson vs. Southern Express Company*, 94 S. C. 44, 78 S. E. 516, held that a law of South Carolina prohibiting the delivery of interstate liquor shipments in that state, which had been held unconstitutional, could derive no force from the Webb-Kenyon Law without re-enactment.

*State vs. Cardwell*, 166 N. C. 308, 81 S. E. 628 (April 22, 1914), was a conviction on the charge of selling liquors in violation of law. The court referred to the Webb-Kenyon Law but stated that it was not involved in the case, because the evidence did not show an interstate but an intrastate shipment.

There are three other decisions involving the Webb-Kenyon Law which are not in accord with the cases cited.

*American Express Co. vs. Beer*, 65 So. 575 (Supreme Court of Mississippi, June 22, 1914), holds that the legislature of Mississippi had power under the Webb-Kenyon Law to restrict the amount of liquor which can be delivered to a consignee and to require a statement to be signed by the consignee in connection with such delivery. The court expressly referred to *Adams Express Co. vs. Commonwealth*, 154 Ky. 462, and *Palmer vs. Southern Express Co.*, 165 S. W. 236, but apparently disagreed with the conclusions reached by the highest courts of Kentucky and Tennessee, preferring to follow *State vs. Grier*, 88 Atl. 579, in the Court of General Sessions of Kent County, Delaware. *American Express Co. vs. Beer* was decided by the Supreme Court of Mississippi, June 22, 1914, and the attention of the court was evidently not directed to the fact that *State vs. Grier*, 88 Atl. 579, had been overruled by the Supreme Court of Delaware in *VanWinkle vs. State*, 91 Atl. 385, on June 16, 1914.

*United States Ex rel Zimmerman vs. Oregon Navigation Co.*, 210 Fed. 378, was an application for writ of mandamus in the District Court for the District of Oregon to require the defendant railway company to transport whisky from Portland, Oregon, to a consignee in prohibition territory in Idaho for his per-

sonal use. The opinion denying the writ is not a careful consideration of the subject. Judge Bean says:

"The language of the Idaho statute is manifestly broad enough to make unlawful all intrastate shipments of intoxicating liquors (except certain shipments not material here), although intended for the personal use of the consignee. And in my judgment it should be so treated and considered by a *nisi prius* court sitting in another jurisdiction until it is otherwise interpreted by the courts of Idaho and especially in a case where it is sought by mandamus to compel a defendant to violate the terms of the statute. Nor am I prepared at this time to say that such a provision is unconstitutional."

The only case relied on by Judge Bean in support of his conclusions was the overruled case of *State vs. Grier*, which he erroneously supposed to be the decision of a court of last resort.

In *State of West Virginia vs. Adams Express Company*, 219 Fed. 794, in the circuit court of appeals for the fourth circuit has already been referred to (R. 45). It was held that the state of West Virginia had the power to enact that the place of delivery in West Virginia of an interstate shipment of liquors in fact purchased by the consignee from the shipper in another state, for the personal use of the consignee, was the place of sale of such liquors, and that the act of the legislature of West Virginia in force July 1, 1914, was such an enactment. It was further held that "The Webb-Kenyon Law removes

the protection (of the interstate commerce clause of the Federal Constitution), and subjects the delivery of liquor in West Virginia to the inhibition of the state legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia."

In addition to these cases there is pending in the Supreme Court of Appeals of West Virginia a case involving the same questions, entitled *Adams Express Company, Appellant, vs. State of West Virginia, Appellee*, No. 2830 on the docket of that court, not yet decided.

We submit that the court below, by its final decree, and the United States Circuit Court of Appeals for the Fourth Circuit, 219 Fed. 794, adopted an erroneous construction of the Webb-Kenyon Law. We contend that that law does not authorize the state to interfere with interstate shipments for personal use, or at any rate the law does not authorize interference with such liquors unless the state, by a law otherwise valid, makes it an offense for a citizen to personally use liquors, or have them in possession for such use. That this limitation in the scope of the Webb-Kenyon Law cannot be removed by the framing of state statutes in different forms; either by forbidding the carrier to transport, or making the place of delivery the place of sale, or other provisions of the kind.



## VI.

**THE WEBB-KENYON LAW, AS CONSTRUED  
AND APPLIED BY THE LOWER COURT WOULD  
BE UNCONSTITUTIONAL.**

The construction of the Webb-Kenyon Law, which has been adopted by the highest courts of Kentucky, Delaware, Tennessee and other states, in the cases referred to herein, should be adopted, and that of the court below rejected, in order to save the constitutionality of the law.

As said in *Rhodes vs. Iowa*, 170 U. S. 412:

“The right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state.”

The power to regulate commerce is the power to prescribe the rule by which the traffic is governed; “Nor” (as said in *In re Rahrer*, 140 U. S. 155) “can Congress transfer legislative power to a state nor sanction a state law in violation of the constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power.”

Contracts made by plaintiff in Maryland where it is legal to sell, for the sale of liquors intended for the

personal use of consignees in West Virginia, where it is no offense for such consignees to possess or use them, their transportation and delivery at destination, are all subject matters which belong to interstate commerce and not to the reserved police power of West Virginia. This is true regardless of the fact that the contracts were made as the result of advertisements sent through the United States mails. A law of West Virginia undertaking to regulate and control such interstate commerce is null and void. The subject matter is one which, in its nature and by the constitution, demands that, if regulated at all, it must be regulated by Congress and not by West Virginia upon an attempted surrender by Congress of the constitutional power.

## VII.

### CONCLUSION.

In *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.*, 223 U. S. 70, the railroad company refused to carry the brewing company's shipments from its place of business in Indiana to consignees in "dry" territory in Kentucky, relying upon the existence of a Kentucky statute prohibiting the transportation and delivery of liquors to points in that state where the sale was prohibited. In the present case the express company does not rely only upon the existence and terms of the West Virginia statute as its excuse for refusing to perform its duties as an interstate carrier, but relies upon the injunction of the Circuit Court of Tucker County, West Virginia (R. 8). That injunction was

issued *ex parte*, the express company filed no answer, made no motion to dissolve, did not attempt even to comply with the terms of the injunction, but upon its issuance ceased entirely to accept shipments for consignees living within the jurisdiction of the Tucker Circuit Court (R. 33). Any difficulty which might have arisen by reason of the fact that the state of West Virginia, the plaintiff in the suit in the Tucker Circuit Court, was not a party and could not have been made a party against its will in the court below, was avoided by the voluntary intervention of the state in the court below. The original decree of the court below (R. 40) commanded the defendant express company to transport plaintiff's shipments to consignees in West Virginia "for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the state of West Virginia to such customers by the plaintiff in the United States mails." The decree required the express company to use reasonable care to ascertain whether any shipments to be tendered by plaintiff were intended for illegal use, and to refuse such shipments. Upon the foregoing grounds we respectfully submit that that decree was a proper one and should be restored.

Lawrence Maxwell,  
Joseph S. Graydon,  
Walter C. Capper,  
J. Phillip Roman,  
Attorneys for Appellant.

## INDEX

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	Page.
ANSWER TO APPELLANT'S FIRST ASSIGNMENT.	
Shipment into the state, of intoxicating liquors, forbidden by the statute, is an unlawful sale in the county, wherein the carrier makes delivery .....	2
Legislature had in mind interstate shipments	14
Statute applies when intended for personal use	15
A moot question: (As to construction since amendment of 1915.) .....	15
Main Proposition on first assignment .....	18
Webb-Kenyon Law is constitutional .....	18
Carrier making delivery becomes common nuisance .....	22
Webb-Kenyon Law and State Prohibition Law not in contravention of the Fifth and Fourteenth Amendments .....	24
ANSWER TO APPELLANT'S SECOND ASSIGNMENT.	
(a) The law prohibits a person, resident or non-resident, soliciting orders within the state .....	26
(b) Soliciting of orders can be done by letters, same as though done in person ....	28
Conclusion .....	34

## Index of Cases, Etc.

---

	Page.
Amendment Prohibition Act, 1915.....	16
Atkinson v. So. Express Co., 94 S. C., 444.....	11
Campbell v. California, 200 U. S., 87.....	18
Crowley v. Christensen, 137 U. S., 86... ..	12
Delamater v. S. D., 205 U. S., 93.....	13, 24
Eberle v. People, 232 U. S., 700.....	12
Hayner v. State, 83 Ohio St. Rep., 178.....	29
Mills v. Green, 159 U. S., 651.....	18
Mugler v. Kansas, 123 U. S., 623.....	12
Palliser In re, 136 U. S., 257.....	31
Prohibition Amendment of West Virginia.....	2
Prohibition Law of W. Va.,.....	3, 4, 5, 12, 16, 17, 22, 23
Rahrer In re, 140 U. S., 545.....	13
Report on Webb-Kenyon Law.....	19, 25
Rhodes v. Iowa, 170 U. S., 412.....	13
Rose v. State, 62 S. E., 117.....	29
Rose v. State, 65 S. E., 770.....	29
Southern Express Co. v. State, 66 So., 115.....	23
State v. Adams Exp. Co., 219 Fed. 794.....	6, 20, 23, 33, 34
State v. Cardwell, 81 S. E., 630.....	12
State v. Miller, 66 W. Va., 436.....	24
State v. Morrow, 18 S. E., 853.....	32, 33
State of Penn., v. W. & B. B. Co., 18 How. 421.....	18
State v. U. S. Express Co., 145 N. W., 451.....	23
U. S. v. Schooner Peggy, 1 Cranch 37.....	18
U. S. v. Thayer, 209 U. S., 39.....	30, 31
Webb-Kenyon Act .....	13, 14
Wilson Act .....	13, 14
Zinn v. State, 114 S. W., 227.....	28

SUPREME COURT OF THE UNITED STATES

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October Term 1914

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THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,*

*vs.*

THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA.

---

Appeal from the District Court of the United States for the  
District of Maryland.

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**BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.**

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The assignments of error, relied upon by appellant, appear at pages 12 and 13 of the brief filed on its behalf.

The first error assigned by counsel for appellant is stated as follows, viz:

“In construing the law of West Virginia as undertaking to make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from another state and delivered to the consignee in West Virginia for his personal use, in pursuance of a sale made by the shipper to the consignee in such other state.”

Our answer to such assignment, in condensed form, is stated as follows, viz:

Under the laws of West Virginia, in case of a sale in which a shipment or delivery of intoxicating liquors is made by a common or other carrier, the sale of such liquors shall be deemed to be made in the county in said state wherein delivery of such intoxicating liquors is made to the consignee by such common or other carrier; although the shipment might have been made by a dealer residing out of the state, upon an order received by him to be filled at his place of business, for shipment and delivery by the carrier to the consignee in West Virginia, for the personal use of the consignee.

#### **ARGUMENT ON FIRST ASSIGNMENT.**

At the general election held in West Virginia in the year 1912, an amendment to the constitution of said state was ratified by the people thereof in the following words and figures:

“On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.”

On the 11th day of February, 1913, the legislature of said state enacted chapter 13, Acts of the session of 1913,



the State Prohibition Law, generally known in the state, and hereinafter referred to in this brief, as the Yost law. Said amendment and law became effective on the first day of July, 1914. Sections 1, 2, 3 and 4 of the Yost law, (or so much thereof as seem to be pertinent to the question now under discussion) are now here set forth, as follows:

"Sec. 1. The word 'liquors' as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquors, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word 'liquors,' as hereinafter used in this act.

"Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors manufactured prior to July first, one thousand nine hundred and fourteen, and stored in United States bonded warehouses in the custody of the United States collector of internal revenue, and the said liquors when tax paid and in transit from such warehouse to points outside of this state.

"Sec. 3. Except as hereinafter provided, if any person acting for himself or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars

nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee. \* \* \* \* \*

"Sec. 4. The provisions of this act shall not be construed to prevent any one from manufacturing for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal

and scientific purposes, or of wine for sacramental purposes, by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. \* \* \*

"It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person not a minor, and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage, or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit, and only in the county where the same is made, and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath. \* \* \*

The Supreme Court of Appeals of West Virginia has not construed the sections above quoted. The Circuit Court of Braxton County, in the equity cause of State

of West Virginia *vs.* the Adams Express Company, in a written opinion, construed the statute as contended for in our answer to the assignments of error, and perpetually enjoined the express company from carrying liquors, either interstate or intrastate, for delivery to consignees within the jurisdiction of the court, although such liquors were intended for the personal use of the consignees. From the final decree, awarding such perpetual injunction, the express company appealed to the Supreme Court of Appeals of West Virginia, the court of last resort therein, and, while the cause has been argued and submitted to the Court, there has been no decision thereof.

The same question arising here arose in the equity cause of *State of West Virginia vs. Adams Express Company*, instituted in the Circuit Court of Kanawha County, removed by the defendant to the United States District Court, and heard upon appeal by the United States Circuit Court of Appeals for the Fourth Circuit, upon appeal prosecuted by the State. The reported opinion of the Circuit Court of Appeals appears in 219 Fed., 794,—advance sheet No. 4, April 1, 1915.

We cannot better state the proposition, nor can we present stronger argument in support thereof, than to quote from the opinion of the Circuit Court of Appeals at pages 796-799, 219 Fed. Rep.:

“1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legisla-

tion; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

"We are not concerned in this case with the question whether the state legislature or the state Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the state and deliveries by common carriers, by which liquor dealers outside of prohibition states were enabled to thwart the efforts of state governments to save the people of the state from the liquor evil, have been forbidden by state legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the act of Congress known as the Webb-Kenyon Act.

"The amendment to the Constitution of the state of West Virginia, known as article 6, sec. 46, ratified in November, 1912, prohibits 'the manufacture and sale and keeping for sale' of intoxicating liquors with exceptions not material here; and it provides that:

'The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.'

"On February 11, 1913, the Legislature enact-

ed a statute to take effect July 1, 1914, which in section three contained this provision:

'Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor \* \* \*; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.' Laws 1913, c. 13 (Code 1913, c. 32a, sec 3 (sec. 1282) ).

"2. At the argument it seemed to be conceded that state legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the state legislative power. The power of the state to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in *Sinnot v. Davenport*, 63 U. S. (22 How.) 227, 16 L. Ed. 243, *Delamater v. South Dakota*, 205 U. S., 93, 27 Sup. Ct., 447, 51 L. Ed., 724, 10 Ann. Cas., 733, and innumerable other federal and state decisions.

'The internal commerce of a state—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government.' *Sands vs. Manistee River*

Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113, 31, L. Ed. 149; Hart v. State, 87 Miss. 171, 39 South. 523, 112 Am. St. Rep. 437.'

"This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in State v. Herring, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep., 461, and State v. Patterson, 134 N. C. 612, 47 S. E. 808.

"3. There is nothing in the amendment of the state Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits 'the manufacture, sale and keeping for sale' of liquors. But it does not indicate a purpose to deprive the Legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the state on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the state as a permanent state policy, that by no means implies an intention to take from the Legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the Constitution as the permanent law of the state. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in State v. Hooker, 22 Okl. 712, 98 Pac. 964.



"4. The point is earnestly pressed that, even if it be true that under the statute in West Virginia delivery in any county of the state is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the state in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person 'who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing or exposing for sale as the case may be', and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the state that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who, either from carelessness or design, habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that habitual aid extended to others violating the law shall not be subject to injunction as a nuisance.

If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in *Re Debs*, 158 U. S., 564, 15 Sup. Ct. 900, 39 L. Ed., 1092, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration is thus stated in the case cited:

‘Every government, intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing to one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court.’

“5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor.”

In

*Atkinson vs. Southern Express Co.*, 94 S. C. 444,

“The state may pass a statute forbidding the importation of intoxicating liquor into this territory for personal use since the passage by Congress of the Webb-Kenyon Act, which prohibits the transportation into any state of any intoxicating liquors, intended to be received, possessed, sold or in any manner used in violation of any law of such state.”

To like effect is the reasoning of Chief Justice Clark in the concurring opinion in

*State vs. Cardwell*, 81 S. E., 630.

It may be said for appellant that the Supreme Court of West Virginia held, years ago, that the place of sale of intoxicating liquors was the place where the dealer carried on his business. Such is true. The common law rule formerly applied. *But the legislature changed the common law rule, and it no longer applies.*

It will not be controverted that a state may enact effective legislation declaring the place of delivery to be the place of sale, when applied to intrastate shipments. Why may it not do so now, as to interstate shipments, because of the enactment of the Webb-Kenyon law?

Section 23 of the Yost law is as follows:

“This entire act shall be deemed an exercise of the police powers of the state for the protection of public health, peace and morals, and all its provisions shall be liberally construed for the attainment of that purpose.”

Independently, however, of the statute, liquor laws are enacted by virtue of the police power to protect health, morals and welfare of the public as expressly stated by the Supreme Court of the United States in

*Mugler v. Kan.*, 123 U. S., 623;  
*Crowley v. Christensen*, 137 U. S., 86;  
*Eberle v. People*, 232 U. S., 700.

In the case of *Crowley v. Christensen*, 137 U. S., 86, the Supreme Court, in the opinion, said:

“There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of a state or of a citizen of the United States. As it is a business attended with dangers to a community it may, as already said, be entirely prohibited, or be permitted un-

der such conditions as will limit to the utmost the evils.”

In *Delamater v. South Dakota*, 205 U. S., 93, it was said:

“The general power of the states to control and regulate within their borders the business of dealing in or soliciting orders for the purchase of intoxicating liquors is beyond question.”

The act of Congress, 26 Stat. 713, c. 728—the Wilson Act—declares that intoxicating liquors—

“transported in any state \* \* \* shall upon arrival in such state \* \* \* be subject to the operation and effect of the laws of such state \* \* \* enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state \* \* \* .”

In *Rhodes vs. Iowa*, 170 U. S., 412, and in *Re Rahrer*, 140 U. S., 545, the word “arrival” in the Wilson Act, was construed to mean the actual delivery to the consignee. In the *Rahrer* case, Mr. Chief Justice Fuller, in the court’s opinion, said:

“No reason is preceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do. \* \* \* Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part.”

*The Webb-Kenyon act supplements the Wilson Act. Both are in effect. Wherein the Wilson act was weak it is now made strong by the Webb-Kenyon act. The Webb-Kenyon act withdrew the protection of the inter-*

*state commerce clause from intoxicating liquors, when shipped into a state, in violation of its laws.*

It is submitted that intoxicating liquors, under the two acts, are now "subject to the operation and effect of the laws of such state \* \* \* enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state", for the reason that the limitation or impediment existing at the time of the decisions in the Rhodes and Rahrer cases has been removed by the Webb-Kenyon act. The Webb-Kenyon act goes to the very root. By its terms, the *shipment or transportation* of intoxicating liquor into a state is prohibited when the intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, in violation of the laws of the state.

Appellant relies on such cases as Adams Express Company *v. Kentucky*, 206 U. S., 129, Vance *v. Vandercook*, 170 U. S., 439, in Re Rahrer 140 U. S., 545, and Rhodes *v. Iowa*, 170 U. S., 412. These decisions were all announced before the enactment of the Webb-Kenyon law. We submit that the language of Mr. Justice White, in the Delamater case, 205 U. S., 93, particularly were the words "and Webb-Kenyon law", made addenda thereto, apropos to the cases so relied upon.

"For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin, because they concerned only the power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

#### **Legislature Had in Mind Interstate Shipments.**

Appellant contends that the legislature did not have in mind interstate shipments, when the Yost law was en-

acted. We submit this contention is not tenable. The legislature did not presume that the manufacture, sale and shipment of intoxicating liquors, in intrastate business, would seriously menace the health and morals, or disturb the peace of the people, in a state where the manufacture and sale of such liquors were prohibited by the constitution and statutes of the state. Those who engaged in selling such liquors, in such a state, endeavor to avoid intrastate shipments by a common carrier; other and less public means and methods are resorted to by such persons engaged in such business. Again, since intoxicating liquors could neither be manufactured nor kept for sale in a state, the legislature did not presume—could not well presume—that shipments thereof would be *intrastate*. On the other hand the legislative presumption was, necessarily so, that the shipments would come, and must so come, from without the state—*interstate*—and the legislative purpose, therefore, was to protect the people of the state from such interstate shipments, and to give force and effect to the public policy of the state as expressed and reflected in the organic and statutory laws.

#### **Personal Use.**

It is contended for appellant that the state legislature did not intend the provisions of section 3 of the Yost law to apply to sales and shipments of intoxicating liquors, when the same were intended for personal use of the consignee. To maintain such contention would require reading into the statute a qualifying clause that is not contained in the statute.

#### **A Moot Question.**

Without the slightest concession to appellant's contention that section 3 of the Yost law was not intended

to apply, and does not apply, to interstate shipments of intoxicating liquors for personal use, we submit such contention is now a moot question of construction.

At the regular biennial session of the West Virginia legislature, session 1915, section 7 of the original Yost law was amended. The original section read as follows:

“The keeping or giving away of intoxicating liquors, or any shifts or devices whatever, to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act.”

By act of the session of 1915, passed the 29th day of January, 1915, approved February 5, 1915, and in effect thirty days from passage, and now chapter 7, Acts 1915 of the West Virginia legislature, the original section 7 was amended so as to read as follows:

“It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four) fruit stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however*, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but



the word "home" as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and *provided, further, however*, that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes."

No section, other than section 7, of the original act was amended or repealed. Among other provisions of the amended section 7 is this:

"And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections 4 and 24."

It is not the theory of plaintiff's bill, prayer or evidence, that Rozier is a druggist; indeed, the whole theory of the bill and prayer is, that the defendant carrier be required to accept from plaintiff and carry and deliver into West Virginia *all* intoxicating liquors tendered to it for carriage when for the personal use of the consignees. We submit the Court will not grant relief to the plaintiff in error, in any event, if the Court finds it cannot grant effectual relief.

In *Mills v. Green*, 159 U. S., 651, at page 653, the Court said:

“The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.”

To like effect is

*Campbell v. California*, 200 U. S., 87.

The cases of *The State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 Howard, 421, and *United States v. Schooner Peggy*, 1 Cranch, 37, we submit, are strikingly in point.

#### **The Main Proposition on First Assignment.**

This leaves, we submit, the main and one great proposition arising on the first assignment, —

Has the state legislature the power to enact such legislation as section 3 and amended section 7 restricting shipment and transportation of intoxicating liquors into the state?

We most respectfully submit it has, unless the Webb-Kenyon law is unconstitutional.

#### **Webb-Kenyon Law is Constitutional.**

We submit the Webb-Kenyon law does not delegate to the states any power that Congress has over interstate

commerce; nor does it confer upon the states the power to regulate interstate commerce. Congress did, however, in its enactment, simply withdraw from intoxicating liquors the protection of the interstate commerce clause of the Federal constitution, when such liquors are shipped into a state in violation of its laws.

The report of the House Committee on the Judiciary, respecting the Webb-Kenyon bill, submitted by Mr. Webb, chairman of the Committee, among other things stated:

"The bill is intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Territory. Few words will suffice to justify the policy of such a bill. Before the Wilson Act of 1890, any person had the right, not only to have intoxicating liquors transported to him from without the State, but also to sell such liquors in the original package. The decision of the court in *Leisy v. Hardin* (135 U. S., 100) held that the consignee of such liquor had the right to sell it in the original package under the interstate-commerce clause of the constitution. The Supreme Court held in the case of *Rhodes v. Iowa* that the Wilson law deprived the consignee of such liquor of the right to sell it in the original package, or otherwise, in violation of the law of the State. \* \* \* \*

"Congress has the power to enact this bill into law. The regulation of commerce with foreign nations, among the several States, and with Indian tribes is completely reposed in the Congress of the United States by article 1, section 8, clause 3 of the Constitution. The power to regulate includes the power to prohibit, as is shown by a long line of decisions of the Supreme Court and by a long line of Federal laws which have never been attacked." Report No. 1461, 62d Congress, 3d session, Feb. 7, 1913.

There were divergent views expressed during debates

on the bill. The Court can look to these debates, when interpreting and construing the law, if the law upon its face is ambiguous.

The Wilson act has been held to be constitutional and has been applied in such cases as in *Re Rahrer*, 140 U. S., 545, and *Delamater v. Dakota*, 205 U. S., 93. The Webb-Kenyon law is the same in principle as the Wilson act, but goes further and is more drastic.

The proposition is so briefly, and yet so clearly, stated by the United States Circuit Court of Appeals in *State of West Virginia v. Adams Express Co.*, 219 Fed., page 802 of the opinion, that we now here quote the same.

"The constitutionality of the Webb-Kenyon statute is attacked on the ground that it is an attempt by Congress to confer on state legislatures the power to regulate interstate commerce. This, we think, is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex parte Rahrer*, *supra*: Lottery Case, 188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed., 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; *Hipolite Egg. Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not impart the power to exclude sound wheat.

"The following language of Mr. Justice White in *Vance v. Vandercook*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or trans-

portation of liquor intended for personal use from a license state to a prohibition state.

'On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States.'

'It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

'As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the states of the Union to combat one of the greatest evils of human life is

founded on deep reason and enlightened public policy."

### **CARRIER WOULD BE PUBLIC NUISANCE.**

Sections 14 and 17 of the Yost law are as follows:

"Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever, as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, building or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

"Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

"It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but

on finding that the material allegations of the bill are true, the court shall order that no liquors shall be sold, bartered, given away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof for a period of not to exceed one year in the discretion of the court from and after such finding, in case of a drug store; in other cases the order for abatement shall be perpetual.

"Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the impanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendant therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein."

It is submitted that any common carrier, such as appellant, would constitute itself a public nuisance, subject to injunction and abatement, if it carries, indiscriminately, intoxicating liquors into the state. *State v. U. S. Express Co.*, (Ia.) 145 N. W., 451; *Southern Express Co. v. State* (Ala.), 66 So., 115. The proposition is so well stated in the opinion of the Circuit Court of Appeals in *State of West Virginia v. Adams Express Co.*, 219 Fed., at page 798, in paragraph 4, already hereinbefore quoted, that we refer to the paragraph and adopt it as part of this brief.



**WEBB-KENYON LAW AND YOST LAW ARE NOT IN CON-  
TRAVENTION OF THE FIFTH AND FOUR-  
TEENTH AMENDMENTS.**

Appellant contends

“that if the constitution and laws of West Virginia properly construed have the effect given them by the judgment below, that they are in contravention of the commerce clause of the Constitution of the United States and the Fourteenth Amendment; that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law does not authorize the state of West Virginia to apply its constitution and laws to interstate commerce in liquors for personal use, in the manner in which they were applied by the court below; that if the Webb-Kenyon Law does authorize the state of West Virginia to so apply its constitution and laws to such commerce, the Webb-Kenyon Law is repugnant to the commerce clause of the Constitution of the United States and the Fifth Amendment.”

The states are possessed of their reserve police power. This power they did not surrender to the federal government. It must be conceded that the state is possessed of the power to forbid sales of intoxicating liquors within its own borders, even when intended by the buyer for personal use. Would it be suggested that one can sell to another intoxicating liquors within the borders of the state, even for personal use, when the law of the state forbids the sale of such liquors? If the state can deny the outside dealer the right to solicit orders from its citizens, under the Wilson Law, when the citizens desire the intoxicating liquors for personal use, without violating the federal constitution and amendments above referred to, (*Delamater v. S. Dakota*, 205 U. S., 93; *State v. Miller*, 66 W. Va., 436) why cannot the state, since the enactment of the Webb-Kenyon Law, deny the right of shipment or transpor-

TATION OF SUCH LIQUORS INTO THE STATE FOR SUCH PERSONAL USE? IF THE STATE CAN DENY ITS CITIZENS THE RIGHT TO PURCHASE INTOXICATING LIQUORS FROM ONE ANOTHER, FOR PERSONAL USE, WITHIN THE STATE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, WHY CAN IT NOT NOW DENY ITS CITIZENS THE RIGHT OF SHIPMENT TO THEM, BY A CARRIER, OF SUCH LIQUORS FOR SUCH USE? WE SUBMIT THE STATE CAN DO SO FOR THE APPARENT REASON THAT CONGRESS HAS DIVESTED INTOXICATING LIQUORS OF THEIR INTERSTATE CHARACTER, WHEN THE "SHIPMENT" OR "TRANSPORTATION" THEREOF INTO A STATE, IS IN VIOLATION OF THE LAWS OF THE STATE.

County local option laws have been repeatedly upheld. Provisions in such laws forbidding shipments into counties for personal use have been repeatedly upheld, when the shipments were intrastate. Indeed we do not recall any decision to the contrary. The effect of such local option laws, depriving, or tending to deprive, a citizen of intoxicating liquors for his personal use, has never led the courts to declare such laws a deprivation of the constitutional rights, state or federal, of the citizen. Since the enactment of the Webb-Kenyon law, we submit, the same principle is now applicable to *interstate* shipments, that is applicable to *intrastate* shipments under state local option laws.

In the majority report from the House Committee of the Judiciary, respecting the Webb-Kenyon Act, report No. 1461, 62d Congress, 3d session, Feb. 7, 1913, hereinbefore referred to, this language is used:

"This bill might well be styled a local option act to give the various states the power to control the liquor traffic as to them may seem best. It would remove the shackles of interstate commerce law from the action of the states and discontinue the handicap under which they now labor, in enforcing their police regulations, and

leave them freer to break up the blind tigers and bootleggers that infest many dry states."

Therefore, in conclusion of the first assignment of error, it is most respectfully submitted that the court below did not err.

### **SECOND ASSIGNMENT OF ERROR.**

The second error assigned by counsel for appellant is stated as follows:

"In construing the constitution and law of West Virginia as prohibiting a liquor dealer in another state from advertising by letters, mailed to citizens of West Virginia, the sale of liquors in such other state, to be delivered in pursuance of such sales to consignees in West Virginia."

In the petition of the state of West Virginia it is charged that the appellants, on and since the first day of July, 1914, has, by printed or written circular letters, order blanks and price lists, solicited citizens of said state, particularly citizens residing in the Sixteenth Judicial Circuit thereof, to give orders to appellant, the James Clark Distilling Company, for intoxicating liquors. That the purpose of such letters, circulars, order blanks, etc., was to procure from the citizens of said state, particularly those residing in said Sixteenth Judicial Circuit, orders for intoxicating liquors to be filled by the appellant, and that the appellant intended to accept such orders and ship such intoxicating liquors to such citizens aforesaid by the defendant, the American Express Company. R. pp. 12-13.

It is established by the admission of John Keating, president and treasurer of appellant, a witness introduced by the appellant, that the appellant, on and since the first of July, 1914, sent circulars and order blanks into West Virginia, soliciting from the citizens thereof

orders for intoxicating liquors kept for sale by the appellant. R. pp. 29-31.

Our first answer to appellant's second assignment of error is this:

The Yost law prohibits any person, resident or non-resident, soliciting within the state orders for intoxicating liquors. This is valid, although such orders may only contemplate a contract resulting from final acceptance in another state. Soliciting of orders is part of the sale. A sale is forbidden, so is any constituent or accessory part thereof forbidden.

Section 3 of the Yost Act, hereinbefore quoted to a large extent, expressly provides:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for any liquors or absinthe, or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be confined," etc. First offense, a misdemeanor; second offense, a felony.

However, it may be said by the appellant that under the Interstate Commerce clause of the Federal Constitution, the provisions of the Yost act relative to soliciting orders cannot be applied to the non-resident dealer, that he is not affected by the laws of West Virginia, so far as intoxicating liquor situated in another state may be concerned, when he intends to fill the order he receives, in response to his solicitation, from his place of business in another state. This has always been the contention of the liquor dealers outside of a state, and, frankly, that contention is supported by a long line of authorities, but that line of authorities is broken. The effect of that line has been modified by the Wilson Act and the Webb-Ken-

yon Act. Our answer is fully sustained by *Delamater v. South Dakota*, 205 U. S., 93.

Our second answer to appellant's second assignment of error is this:

While there is no Federal law that forbids the use of the mails to a non-resident liquor dealer to solicit orders for intoxicating liquors or advertise the same by circular, order blank and price list, it is, however, most respectfully submitted that,

*the soliciting of orders for intoxicating liquors can be done by letters, price lists and order blanks, the same as though the dealer solicited in person.*

True, appellant used the mails to send letters, price lists and order blanks to citizens of West Virginia. It was not contended in the court below, and it is not contended here, that such use of the mails violated the laws of West Virginia. The legislature of West Virginia could not declare such use of the mails to be unlawful. Congress alone can say what shall not be mailable.

Let us suppose appellant delivered in person the soliciting letters. Will any one say it had not solicited in violation of the state's law? What distinction is there between personally delivering the letters and sending them by a *servant*—the postoffice—of the writer? In *U. S. vs. Thayer*, 209 U. S. 39, the Court said:

"If the writer of the letter in person had handed it to the man addressed, in the building, without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer."

In *Zinn v. State*, (Ark.) 114, S. W., 227, it was held that a statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory through agents, circulars or newspaper advertisements is a valid

exercise of the state's police power, and it was expressly held in such case that

“A statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through circulars, is not unconstitutional as infringing the power of Congress, under U. S. Const., Art. 1, Sec. 8, to establish postoffices and designate what shall be excluded from the mails.”

In

Hayner v. State, 83 Ohio St. Rep. 178, it was expressly held that a solicitation for intoxicating liquors may be made by letter as well as in person. Hayner was indicted and convicted for soliciting orders for intoxicating liquors. It was shown that he solicited the order by letter sent through the United States mails. The conviction was upheld by the court of last resort of Ohio, the Court holding that the Hayner letter, while mailable, so far as the laws governing the mails were concerned, was a solicitation

*same as though he had solicited in person,*

and that a statute, making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through agents, circulars, posters, letters, etc., is not unconstitutional as infringing the powers of Congress relating to what shall be excluded from the mails.

In *Rose v. State*, (Ga.) 62 S. E., 117, the Intermediate Court furnishes a very able discussion of the proposition here involved. True, the Georgia Supreme Court, 133 Ga. 353, 65 S. E., 770, 36 L. R. A. (N. S.) 443, reversed the Intermediate Appeal Court. The opinion of the Georgia Supreme Court was handed down October 1, 1909, before enactment of the Webb-Kenyon Act. The reasoning of the Georgia Supreme Court, for the reversal, in substance, was, that the Tennessee dealer, under the Interstate Commerce clause, engaged in selling intoxicating liquors, was handling an article that was legitimate interstate commerce, not subject to any restriction by the state. The Court, in the opinion, said:

29

“To hold that a person had a right to make an interstate sale, but that the state to which the liquor was to be sent could prohibit him from using the interstate mails for the purpose, would certainly greatly curtail the right to do such business.”

It is apparent from the opinion of the Georgia Supreme Court that it reversed the Intermediate Appellate Court upon the ground that intoxicating liquors were unqualifiedly legitimate interstate commerce. Since the enactment of the Webb-Kenyon Act such is no longer true. Now, intoxicating liquors are divested of their interstate character when the shipment or transportation thereof into a state, to be there received, possessed, sold or in any manner used by any person interested therein, is in violation of the law of the state.

A very clear and, we submit, determinative ruling of the Supreme Court of the United States, is found in

U. S. *v.* Thayer, *supra*.

Thayer, by letter, solicited funds for campaign purposes in violation of the Civil Service Act. The Court held that the solicitation was not complete until the letter was delivered to the person from whom the contribution was solicited. Such, in principle, is the proposition we are making here. It was no offense for plaintiff to deposit its letters in the mails. It was no solicitation of the citizens of West Virginia to buy liquors from appellant until its letters were delivered to the persons from whom the orders were solicited. The postoffice then had nothing more to do with the letters. The postoffice was a mere, innocent, inanimate agency that carried the soliciting letters. So long as the letters remained in the custody of the postal authorities, there were no solicitations—no offenses committed by appellant. The offense arose after the letters were delivered by the postal authorities and in the hands of the persons solicited to



give orders or in the hands of such persons as advertisements of appellant's business.

Mr. Justice Holmes, speaking for the Court, in the Thayer case, pages 42-3, said:

"Of course it is possible to solicit by letter as well as in person. It is equally clear that the person who writes the letter and intentionally puts it in the way of delivery solicits, whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way. It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. \* \* \* If the writer of the letter in person had handed it to the man addressed, in the building without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer.

"The solicitation was made at some time, somewhere. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation."

Of like holding is the case of

In Re Palliser, 136 U. S., 257.

It is no answer to say that in the Thayer case it was an offense anywhere in the United States for one to solicit campaign contributions in a public building, for the reason, that, as stated by the Supreme Court in both of the cases just cited, *that one may solicit by letter as well as in person*, and particularly because the Court says that if the letter had never reached the person to whom addressed, there was no solicitation, the Court saying:

"If the letter had miscarried or been burned, the defendant would not have accomplished the solicitation."

Let us further illustrate the proposition. The addressee received from appellant, through the United States mails, a letter soliciting an order for intoxicating liquors. He received such letter in West Virginia. The postal authorities, after delivery, no longer had control of the letter. The addressee could do as he pleased with it. Suppose he had destroyed it without reading or otherwise learning its contents. *No solicitation, no offense.* But he did *not* destroy the letter. He learned its contents—he had been solicited in West Virginia—an offense was committed in West Virginia, *after delivery of the letter by the postoffice.*

It may be said, however, that such holding would interfere with the use of the mails. Not at all. Had appellant's personal representative come into the state in person and solicited, and been apprehended, could it be said that he had committed no offense, because to so hold would be interfering with interstate commerce?

We submit the principle contended for here is further supported by the case of

*State v. Morrow*, (S. C.) 18 S. E., 853.

Morrow sent by mail from Washington, D. C., to a woman in South Carolina certain pills to be used for certain purposes. He suggested, by letter the use of the pills to cause abortion. To suggest abortion, or aid the same, was an offense by the statute of South Carolina. The pills were received, the advice of Morrow acted upon, resulting, in connection with other things, in the death of the woman. Morrow was indicted and convicted in South Carolina for a statutory offense. The offense was not committed by mailing the pills. For some purposes they might have been lawful. The Supreme Court of South Carolina, in the opinion, said:

“Upon the same principle, it seems to us that when the defendant procured the pills in Washington, and put them in the mail to be delivered

to Colie Fowler in Columbia, for the unlawful purpose charged, it was, in contemplation of law, the same thing as if he had there delivered the pills, to the woman for whom they were intended, in his own proper person. Instead of coming in person to Columbia to deliver the pills, he simply employed the agency of the mail to do the act which he desired to have done, and which was done by his express authority and direction in this state."

The Court held that it was immaterial that the offense charged was a statutory offense independently of common law offense.

The Circuit Court of Appeals, in the State of West Virginia *v. Adams Express Co.*, 219 Fed., at pages 799 and 800, said:

"6. The right of the state to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another state, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

"7. It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like

use of the mails to promote a criminal conspiracy, or to perpetuate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. In *re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; *United States v. Thayer*, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; *Hayner v. State*, 83 Ohio St. 178, 93 N. E. 900; *State v. Morrow*, 40 S. C. 221, 18 S. E. 853."

We submit, therefore, that such soliciting is an unlawful act on the part of the outside dealer or seller, who is a party interested in such transaction, and therefore prohibited by the state law, the Wilson Act and the Webb-Kenyon Act, and vitiates any sale and shipment made upon such solicitation, for the reason that such solicitation is a part of the sale,—an unlawful element in the sale.

#### CONCLUSION.

We most respectfully submit that there is no error in the decree complained of.

FRED. O. BLUE,  
Counsel for the State of West  
Virginia, Appellee.





Miss Susan Carl, L.

FILED

FEB 21 1916

JAMES B. MAHER

CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 383

THE JAMES CLARK DISTILLING COMPANY,  
APPELLANT,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY  
AND THE STATE OF WEST VIRGINIA,  
APPELLEE.

No. 384

THE JAMES CLARK DISTILLING COMPANY,  
APPELLANT,

vs.

THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA,  
APPELLEE.

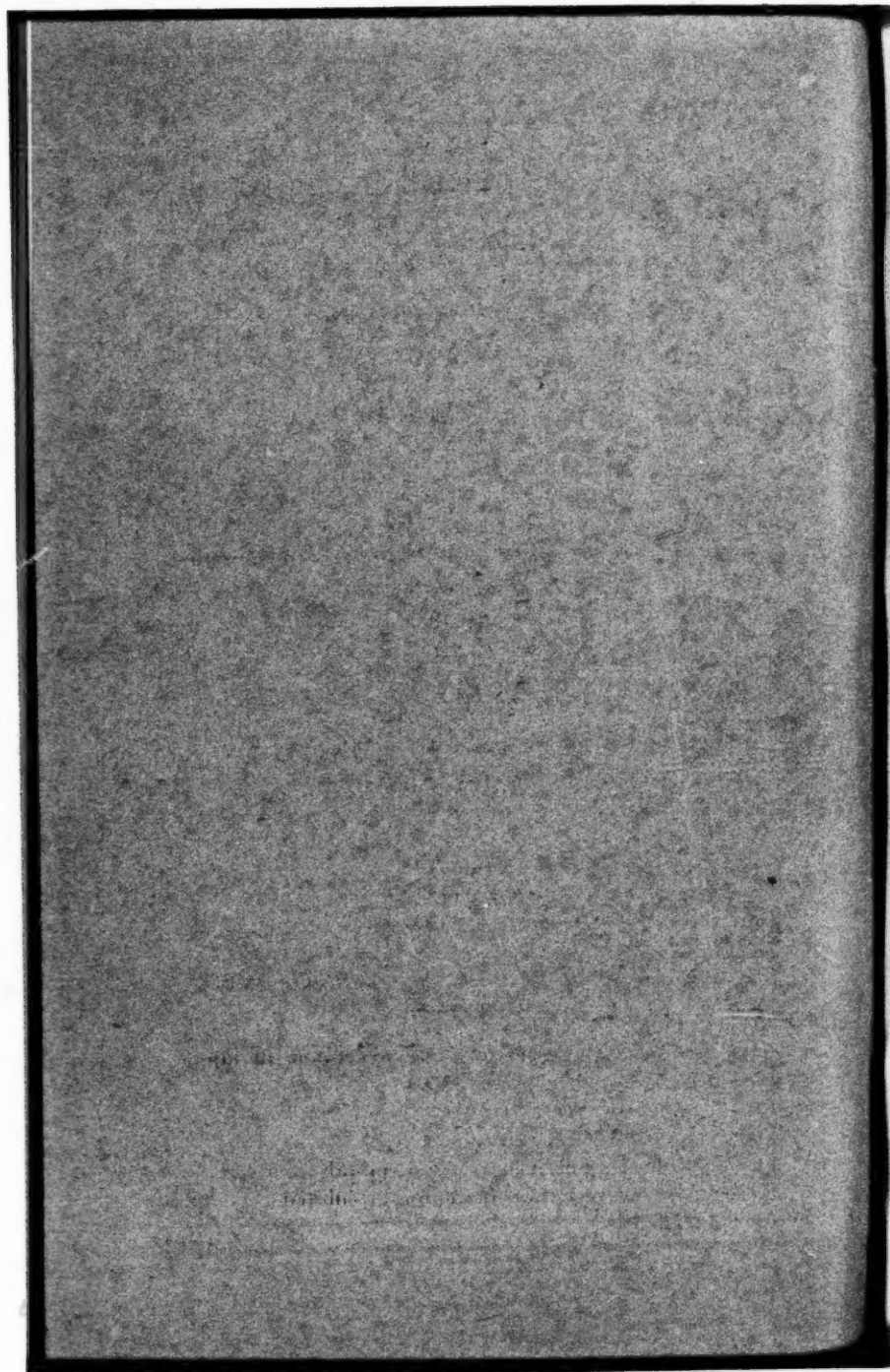
APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE STATE OF WEST VIRGINIA,  
APPELLER.

W. B. WHEELER,

*Of Counsel for the State of West Virginia.*





# INDEX

## QUESTIONS PRESENTED IN BRIEF.

Constitutionality of Webb-Kenyon Law.

Constitutionality of Law of West Virginia.

## WEBB-KENYON LAW.

	Page
Webb-Kenyon Law authorized by Federal Constitution	8
Cases sustaining law	9
Congress has not delegated legislative power	10
Congress has power to prohibit deleterious commodities	12
Articles prohibited through interstate commerce	14, 15
Commerce in outlawed liquors	15
Intoxicating liquor a deleterious commodity	22
Congress may prohibit entirely or do less	29
Possession and reception of liquor not constitutional guarantee	32
Purpose of prohibition legislation to minimize use	37
Webb-Kenyon Law as police regulations	40
Innocent acts may be prohibited to prevent admitted evil	43
Cases cited by appellant distinguished	47
Purpose of Webb-Kenyon Law	52
Presumption as to constitutionality	57
Protection of public morals a necessity	60

## CONSTITUTIONALITY OF LAW OF WEST VIRGINIA.

Laws prohibiting possession and reception of liquor valid under police power	64
Police power of West Virginia	64
Constitution of West Virginia	69
Laws protecting public health and morals	70
Possession and reception of liquor prohibited	71

The law has a reasonable relation to the purpose to be accomplished .....	70, 71
State may classify objects under police power.....	76
West Virginia laws provide proper classification.....	77
Transactions accessory to evil may be prohibited.....	78
West Virginia Courts sustain legislation involved.....	80

## INDEX OF CASES

	Page
American Express Co. vs. Beer, 65 Sou., 581.....	30
American Express Co. vs. Iowa, 196 U. S., 133.....	54
Atkinson vs. Southern Express Co., 94 S. C., 444.....	9
Addyson in re. 175 U. S., 211.....	41
Adams Express Co. vs. Commonwealth, 169 S. W., 603..	9
A. T. & S. F. R. Co. vs. Matthews, 174 U. S.....	58
Beebe vs. State, 6 Ind., 542.....	24, 68
Beer vs. Mass., 97 U. S., 33.....	65, 68
Booth vs. Illinois, 184 U. S.....	46
Bowman vs. Northwestern, 125 U. S., 500.....	52
Brown vs. Walker, 161 U. S.....	58
Buttfield vs. Stranahan, 192 U. S., 470.....	14
Canfield vs. U. S., 167 Rep., 518.....	41
Champion vs. Ames, 188 U. S., 356.....	18, 56
Commonwealth vs. Brelsford, 161 Mass.....	45
Commonwealth vs. Campbell, 133 Ky.....	47
Crowley vs. Christensen, 137 U. S., 86.....	23, 46, 68
Delameter vs. South Dakota, 205 U. S., 93.....	52, 80
Dinkins vs. State, 149 Ala., 49.....	45
Eidge vs. Bessemer, 164 Ala., 599.....	33, 47, 49
Ex parte Crane, 151 Pac. Rep.....	38
Elder vs. State, 162 Ala., 41.....	45
Engel vs. O'Malley, 219 U. S., 128.....	76
Feibleman vs. State, 149 Ala., 49.....	45
Foster vs. Kansas, 112 U. S., 201.....	68
Gibbons vs. Ogden, 9 Wheat. 1.....	59
Giozzo vs. Tiernan, 148 U. S., 657.....	67, 77
Glenn vs. Southern Exp. Co.....	9, 79
Goddard vs. The Town of Jacksonville, 15 Ill., 589...	24, 68
Gottstein vs. Washington .....	9

	Page
Heath Mfg. Co. vs. Worst, 338, 207 U. S.	76
Hippolite Egg Co. vs. U. S., 45	15
Hoke vs. State, 227 U. S., 309	42, 63
Hooper vs. California, 155 U. S., 648	80
Kansas vs. Missouri Pac. Ry.	15
Kidd vs. Pearson, 128 U. S., 1	46, 68, 76
Lincoln vs. Smith, 27 Vt., 320	39, 70
Louisville & N. R. R. Co. vs. Melton, 218 U. S., 36	76
Marks vs. State, 169 Ala., 71 at page 84	39, 70
Meager vs. Crima, 8 Howard, 490	76
Mugler vs. Kansas, 123 U. S., 623	23, 33, 46, 51, 68
New York vs. Hesterberg, 211 U. S., 31	49
New York ex rel Hatch vs. Reardon, 204 U. S., 162	72
Ohio ex rel Dollison, 194 U. S., 445	30
Our House No. 2 vs. The State, 4 Freem. (Iowa) 172	68
Patson vs. Pennsylvania, 332 U. S., 138	49, 72
Pennell vs. State, 123 N. W. Rep., 115	45
Phalen in re., 8 Howard, 161	42
Preston vs. Drew, 33 Me., 558	33
Purity Extract Co. vs. Lynch, 226 U. S. at 201	45, 48, 85
Rahrer in re., 140 U. S., 562	12
Reid vs. Colorado, 189 U. S., 137	14
Rhodes vs. Iowa, 170 U. S., 412	53
Ripey vs. Texas, 193 U. S., 504	30
Santo et al vs. State, 2 Iowa, 165, 190	68
Southern Express Co. vs. State, 66 So. Atl., 115	9
Southern Express Co. vs. Whittle	9, 34, 40, 49, 74
Southern Express Co. vs. Beer, 65 So., 575	9
State vs. Crawford, 42 Am. Rep., 186	25, 68
State vs. Davis, 2864 W. Va.	49
State vs. Delaye, 68 S., 996	39, 52, 81
State vs. Doe, 13 Pac. (Kas.), 1169	9, 32
State vs. Frederickson, 101 Me., 37	44, 45
State vs. Gilman, 33 W. Va., 146	38, 47, 84
State vs. High Point, 83 S. E., 254	34
State vs. Intoxicating Liquor, 76 Iowa, 243	45
State vs. Kansas, 80 Pac. Rep., 989	26, 68

	Page
State vs. Maine, 20 L. R. A., 496.....	38
State vs. Phillips, 67 So., 651.....	40, 48, 52
State vs. Piche, 98 Maine, 348.....	45
State vs. Sixo, No. 2895, W. Va.....	47, 83
State vs. U. S. Express Co., Sup. Ct. Iowa, 145 N. W. Rep., 551 .....	11
State vs. S. A. Ry. Co., 84 Sou., 283.....	9
State vs. Walder, 83 O. S., 68 at page 84.....	45
State vs. Williams, 146 N. C., 618.....	38, 51
United States vs. Cohn, 32 S. W. Rep., 38.....	44, 45
United States vs. Gettysburg Elec. Co., 160 U. S., 668. .	19, 58
United States vs. 43 Gallons Whisky, 93 U. S. 188.....	14
United States vs. Harris, 106 U. S., 635.....	57
United States vs. Knight, 156 U. S., 325.....	54
United States vs. Oregon, 210 Fed. 378.....	9
Taylor vs. Commonwealth, 853 E. Rep., 499.....	9
Vance vs. Vandercook Co., 170 U. S.....	53
Van Winkle vs. State, 91 Atl. (Del.), 385.....	9
Williams vs. State, 179 Ala., 50.....	47
West Virginia vs. Adams Express Co., Fed. Rep. vol. 219, No. 4 .....	9, 53

52.



NOS. 383-384.

# Supreme Court of the United States

OCTOBER TERM, 1915.

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THE JAMES CLARK DISTILLING CO.,

Appellant.

vs.

THE WESTERN MARYLAND RAILWAY CO.,

and THE STATE OF WEST VIRGINIA,

Appellees.

---

THE JAMES CLARK DISTILLING CO.,

Appellant.

vs.

THE AMERICAN EXPRESS CO. AND THE STATE  
OF WEST VIRGINIA

Appellees.

Brief for the State of West Virginia.

## STATEMENT OF THE CASE

These cases were heard in the October term, 1914, along with the case of the Adams Express Co. v. The Commonwealth of Kentucky. They were re-docketed for hearing without any motion for re-hearing having been filed. The court did not indicate any particular point on which the cases were to be re-argued. They will be briefed therefore as for an original hearing.

The construction of the West Virginia law and the state prohibition amendment of West Virginia have been fully discussed in a very able brief by Honorable Fred O. Blue, State tax and prohibition commissioner of West Virginia. In the brief which we submit

\* Blackface and capitals in this brief supplied.

herewith we confine ourselves to two propositions which are involved in this case.

First, Is the Webb-Kenyon law constitutional?

Second, Has the State of West Virginia the authority to enact the legislation involved, to-wit:

To prohibit the **possession and receipt** of intoxicating liquor for beverage purposes, from a common carrier.

## CONSTITUTIONALITY OF WEBB-KENYON LAW

### I

#### POWER OF CONGRESS TO ENACT LAWS REGULATING INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Article I. Section 8, clauses 3 and 18, set forth the power of Congress to enact laws regulating interstate commerce. They read as follows:

"To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

"To make all laws which shall be necessary and proper for carrying into execution the power given."

#### THE WEBB-KENYON LAW IS AUTHORIZED BY THE FEDERAL CONSTITUTION.

The Webb-Kenyon law has been sustained by five courts of last resort since the last hearing on these cases. The validity of the law or its application to the facts have been considered in many courts. In three instances the courts did not pass directly upon the constitutionality of the law. The Court of Appeals in Kentucky, 154 Kentucky 462, held that the facts did not constitute a violation of a valid state law. The Supreme Courts of Tennessee and Delaware reached a similar conclusion in the cases before them, namely, that the shipments were for a lawful purpose and therefore did not come under the provisions of the Webb-Kenyon law. In no case has a Court of last resort held that the Webb-Kenyon law was unconstitutional. On the other hand this law has been declared con-

stitutional and valid by every State Supreme Court, the United States Circuit Court of Appeals and all of the upper courts in the State and Federal government which have passed upon its constitutionality.

Glen vs. Southern Exp. Co. N. C., decided Dec. 1, 1915.

Southern Express Co. v. State, 66 So. Rep. 115.

Southern Express Co. v. Whittle (Ala.) 69 So. Rep. 652.

West Va. v. Adams Ex. Co. (C. C. A.) 219 Fed. 794.

State v. S. A. L. R'way (N. C.) 84 S. 283.

State v. Doe (Kansas) 139 Pac. 1169.

Kans. vs. Mo. Pac. Ry.

State v. Express Co. (La.) 145, 451.

Sou. Express Co. v. Beer (Miss.) 65 South 575.

United States v. Oregon & W. R. & N. Co. 210 Fed. 378.

Atkinson v. Sou. Ex. Co. 945 C. 444, 78 S. E. 516

45 L. R. A. (N. S.) 349.

Van Winkle v. Delaware, 91 Atl. 385.

Gottstem v. Washington, decided December 12, 1912.

Tailor vs. Commonwealth, 85 S. E. Rep. 499.

The court of last resort in Kentucky on November 4, 1915, in the last case before it, Adams Express Company v. Com. (Ky), 169 S. W. 603, held:

"The Webb-Kenyon Act puts beyond the protection afforded interstate commerce any intoxicating liquor shipped into the state to be sold or in any manner used, in violation of the laws of the state."

The court cited most of the above cases as authority for their decision.

This court in the recent case of Adams Express Company v. Kentucky, October term, 1914, said:

"The Constitution of the United States grants to Congress authority to regulate commerce among the States to the exclusion of State control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the

Constitution itself. \* \* \* Before the passage of the Webb-Kenyon Act, while the state in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there is nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the State by means of interstate commerce."

This Court has repeatedly held in an unbroken line of decisions from *Gibbons v. Ogden*, 9 Wheaton, page 1, down to the last case before this Court, involving this question that there is no limitation on Congress in regulating interstate commerce except what is found in the Constitution itself. There is no provision in the Constitution which prohibits Congress from enacting a measure like the Webb-Kenyon law.

## 2

### THE LAW IN QUESTION IS NOT A DELEGATION OF LEGISLATIVE POWER

It is the theory of those who oppose this law, that Congress has delegated some power to the State to regulate interstate commerce. Under the plenary power of Congress to regulate interstate commerce, this law provides that the protection of interstate commerce shall be denied to intoxicating liquors which are shipped from one State to another when such liquors are to be received, or possessed, or used in violation of the State law. This is not a delegation of power, it is an absolute exercise of the power of Congress. It does not prohibit all liquors from the channels of interstate commerce, but simply those which are transported, received, possessed or used in violation of the laws of the State. If it be conceded that all

liquors may be denied the privilege of interstate commerce, then it follows that the shipment of these which are in violation of the law, may be denied the privilege of interstate commerce.

An illuminating discussion on this point is found in the decision of the Supreme Court of Iowa, *State vs. U. S. Express Company*, 145 N. W. Rep. 551:

"There are no words of delegation in the act itself, and the theory of it is that liquors intended for use, contrary to State rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the State is interfering with interstate commerce, for the reason that right of such shipments between the States is denied by Federal legislation. It is true that the effect of the act is to give the States more power, but there is no such express delegation and the language of the act is in no sense permissive. The act is prohibitory in character and acts not upon States but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation.

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confined to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it has already had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

"Congress may say the power to engage in interstate or international commerce shall not be understood as permitting anybody to sell opium or intoxicating liquors to anyone else, and that they shall be excluded altogether from the domain of interstate commerce. That Congress has a right to

say \* \* \* That is not a question of delegated power. It is not a question of permission to the State. It is a question of the right of Congress to prescribe what shall be the limit of interstate commerce."

See also cases cited supra.

Congress does not delegate power to the states to regulate interstate commerce, but Congress itself prohibits the facilities of interstate commerce to all liquors outlawed in the states under the police power. It was decided in *Hill vs. Hesterberg*, 184 N. Y. 126 at 132:

"That Congress can authorize an exercise of police power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in *Re Rahrer* 140 U. S. 545."

Congress released its control over liquor shipped by interstate commerce under the Wilson Law upon arrival. This gave the States some relief in the enforcement of their laws. The Webb-Kenyon Act goes one step further and prohibits all shipments of liquor into a State for a purpose prohibited by State law. In neither case is there a delegation of power, but there is a proper use of power concurrently by the State and Federal governments within their respective jurisdictions in dealing with a recognized evil.

#### CONGRESS HAS POWER TO ELIMINATE DELETERIOUS COMMODITIES FROM INTER-STATE COMMERCE

It is a mooted question how far Congress may go in regulating or removing useful commodities from the channels of interstate commerce, but there is ample authority for the proposition that any article of commerce which is detrimental to public morals may be eliminated from commerce entirely.

The Supreme Court recognized this principle of legislation when it upheld the action of Congress forbidding the

interstate traffic in lottery tickets in the following language, 188 U. S. 356:

"We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is in effect a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode of regulation of that particular kind of commerce? \* \* \* In determining whether regulations may not under some circumstances properly take the form of or have the effect of prohibition, the nature of the interstate traffic which it has sought to suppress cannot be overlooked.\* \* \* But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to public morals. \* \* \* In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lottery tickets, as well as the sale or circulation of lottery tickets, within their respective limits. It is said, in effect, that it would not permit the declared policy of the States which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

"If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another,



we know no authority in the Courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the nation. It is a kind of traffic which no one can have the right to engage in."

#### COMMERCE WITH INDIAN TRIBES.

In *United States vs. 43 Gallons of Whisky*, 93 U. S. 188, the Supreme Court states:

"Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the unlicensed introduction and sale of spirituous liquors in the 'Indian country,' but may extend such Prohibition to territory in proximity to that occupied by Indians."

In *Buttfield's case*, 192 U. S. 470, it is held Congress has plenary power to prohibit the importation of goods from foreign countries. To the same effect is the *Gibbons case* in the *Northern Securities Litigation*, 193 U. S. 334, where the court said:

"By the expressed words of the Constitution, Congress has power to regulate commerce with foreign nations and among the several States and with the Indian tribes. In view of the numerous decisions of this court there ought not at this day to be any doubt as to the general scope of this power. Under some circumstances regulation may properly take the form and have the effect of prohibition."

#### TRANSPORTATION OF ANIMALS.

By the *Animal Husbandry*, 23 Stat. 31 Ch. 60, of May, 1884, Congress prohibited the transportation of live stock between the States which had or might have infectious and contagious diseases.

*Reid v. Colorado*, 189 U. S. 137, sustains the constitutionality of this act of Congress, and also sustains the con-

stitutionality of a Colorado State statute, supplementing the constitutional act and providing far more stringent provisions. In fact, in this particular case the shipper had complied with the provisions of the congressional act. Justice Harlan said:

"Now it is said the defendant has a right under the Constitution of the United States to ship live stock from one State into another. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a State against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals."

#### TRANSPORTATION OF FOOD AND DRUGS.

By the Pure Food and Drugs Act of 1906, Congress prohibited the shipment into any State of certain adulterated or misbranded foods and drugs.

In *Hippolite Egg Co. v. United States*, 220 U. S. 45, the Supreme Court of the United States sustained the constitutionality of this act.

#### COMMERCE IN OUTLAWED LIQUORS.

The Supreme Court of Kansas in the recent case of *State vs. Missouri Pacific Railway Company*, No. 19984, decided this proposition in a very well considered and exhaustive opinion as follows:

"Next, as to the power of Congress to class intoxicating liquor as a commodity fraught with danger of damage and therefore to be excluded from interstate commerce, it is said that unlike statutes relating to the lottery tickets, diseased meats and other articles which have been denied the privilege of interstate commerce, this act denies such privileges to intoxicating liquors only in certain local territory dependent entirely upon State legislation, thus leaving it recognized as a legitimate article of interstate commerce when shipped under certain conditions and circumstances and entirely illegitimate under other circumstances and conditions." \* \* \*

"The title is—'An Act divesting intoxicating liquors of their interstate character in certain cases.'

\* \* \* Congress has, therefore, undertaken to divest of its interstate character all intoxicating liquor shipped into a State to be used for an unlawful purpose—that is, for a purpose made unlawful by any law of such State. When the law of a given State makes it a crime to sell intoxicating liquor, Congress intends that any liquor shipped in for the purpose of violating such statute shall be divested of its interstate character and that all the protection incident to such character shall be removed from it.

"This brings us to the vital question on which will hang all the law of the prophets of this conviction, namely; whether the power granted to Congress by the Constitution to regulate interstate commerce includes the authority thus to divest a given commodity of its interstate character.

"In considering this most important and far-reaching problem it is one thing to regard its solution as a logical deduction to be drawn mechanically from the language of the Constitution and another thing to account this a serious, deliberate attempt by the law-making power of the nation to obey the very spirit of the Constitution itself framed for the professed purpose of insuring domestic tranquility and promoting the general welfare. The citizen, who driving close to the brink, passes the danger line and finds himself in the wrecked condition brought about by transgressing the law, will search with eagerness for some solace and protection in the great fundamental charter whence the body which enacted the law derived its power. Under these circumstances the searcher asserts with vehemence the rights of the individual as against the assumed corrective power of the State itself, and the immortal blessings of personal liberty find no greater champions or more eloquent eulogists than those who are accused of violating statutes prescribed for the government of their conduct. It may be said, however, that constitutions are not framed and adopted for the special benefit of those who disregard or stretch to the breaking enactments intended for the enhancement of the public peace and welfare, but for the good of the citizenship at large, and the protection of higher

things of real value to humanity which make life worth living. Civil conditions cannot remain stationary and unless they retrograde they must advance, and when the law-making power of the nation upon serious thought and careful deliberation, enacts a statute manifestly and unmistakably intended to promote the public health and morals and happiness it must be presumed, until the contrary is clearly shown, that it acted within its lawful province and power. Let us see, then, whether liquors shipped into a state for the purpose of violating its statutes can be divested of their interstate character in the exercise of Congress of its power to regulate interstate commerce. \* \* \*

"In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to those new conditions.

"As said by a brilliant and well-known member of the legal profession:

"\* \* \* The Constitution our fathers made had the marching quality in it; \* \* \*."

"It has been supposed by some students of our national history that a written constitution is an inert mass of tabulated provisions. The supposition is not correct; for the national Constitution, under the guidance of our great court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of 'progressing history.' This does not mean that a written Constitution grows by being violated whenever its provisions stand in the way of national progress; but it does mean that our Constitution was, by the enlightened foresight of its framers, made to be an intelligent guide and chart, not a mere list of obstacles. (George R. Peck, Reports of American Bar Association, 1900, Vol. 23, pages 256 and 275.)

"We now see the great end which they proposed to accomplish. It was to frame, for the consideration of their constituents, one Federal and national Constitution—a Constitution that would produce the advantages of good, and prevent the inconvenience of bad government—a Constitution whose beneficence and energy would pervade the whole Union, and bind and embrace the interests of every party, a Constitution that would insure peace, freedom and happiness, to the States and people of America." (Lectures of James Wilson, Vol. 1, p. 542.) "Although Congress cannot authorize a State to legislate, it may adopt State legislation; it may divest designated articles of their interstate commerce character and subject them to the operation of State laws \* \* \*." (Sutherland's Notes on United States Constitution, p. 79.)

"That the power to regulate includes the power to prohibit the interstate transportation of at least certain classes of commodities has been placed beyond question by the decision of the court in *Champion v. Ames*." (188 U. S. 321.) (Willoughby on the Constitution, Vol. 2, Sec. 347.)

"A writer of great legal experience and ability, in speaking of the power of Congress to regulate commerce, said: 'Having ascertained, then, what commerce is, and what are some of its elements, which may be the subject of the action of Congress, or of the attempted action of the States, we next come to consider what it is to regulate commerce. \* \* \* Commerce being intercourse and traffic between people, to regulate it is to prescribe rules by which it shall be conducted.' (Miller on the Constitution, p. 449.)

"In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, Mr. Justice Field in delivering the unanimous opinion of the court, said (p. 203):

"'Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations vested in Congress is the power to prescribe the rules by which it shall be governed, that is the conditions upon which it

shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.' At page 215, the court quotes with approval from Judge Cooley, (*Cooley's Constitutional Limitations*, 732), to the effect that Congress may descend to the most minute directions of interstate commerce and may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution.

"In *United States v. Gettysburg Electric Ry. Co.* 160 U. S. 668, the act of August 1, 1888.

"'An act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by Congress, must be valid.' (p. 429.)

"Again:

"'Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of the battle, in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. \* \* \* No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and any inference from them all may be drawn that the power claimed has been conferred.' (p. 430.) \* \* \* 'For it is of as much national importance to make men sober as to make them patriotic.' In the case of *In Re Rahrer*, 140 U. S. 545, holding constitutional the Wilson bill which removed from interstate shipments

is it logically inconsistent with plenary power to regulate the traffic in such commodity between the States, because it is now the settled doctrine of the Federal courts that interstate commerce is a subject on which primarily Congress alone may legislate and of which it alone has jurisdiction and concerning which the State may not assume to act except incidentally whether Congress sees fit to act or not. The inevitable corollary of this doctrine is that Congress possesses over this subject power so ample and so complete that it may well remove from a commodity otherwise legitimate its interstate character and protection whenever its movement in interstate commerce is for the accomplishment of an unlawful purpose—the violation of the laws of one of the sister States of the Union. Those who contend for the invalidity of the act must base their reasoning on the slender platform that intoxicating liquor when transported for the purpose of violating a State statute is by some subtle constitutional alchemy of the same national importance and entitled to the same governmental protection as if it were brought into the State for the most beneficent purpose imaginable. We deem this line of argument and the conclusion resulting therefrom opposed to the true doctrine of constitutional interpretation and to the spirit expressed by the framers of the Constitution when the preamble was formulated.”

**ALCOHOL OR INTOXICATING LIQUOR USED AS A BEVERAGE IS A DELETERIOUS COMMODITY AND MAY BE EXCLUDED FROM INTERSTATE COMMERCE.**

Science has demonstrated and governments of the world have officially recognized these facts about intoxicating liquor.

Alcohol, or intoxicating liquor, is a poison to all life, plant and animal.

At the International Congress on Alcoholism in London in 1909 where many well-recognized and well-known scientific men and medical leaders from all the great nations were in attendance, the following statement defining the



nature of alcohol was drafted and signed by large numbers of these leaders:

"Exact laboratory, clinical and pathological research has demonstrated that alcohol is a dehydrating protoplasmic poison, and its use as a beverage is destructive and degenerating to the human organism. Its effect upon the cells and tissues of the body are depressive, narcotic and anaesthetic. Therefore, therapeutically its use should be limited and restricted in the same way as the use of other poisonous drugs."

The committee of fifty-one which determines what drugs and narcotics shall be recognized as medicine in the United States Pharmacopoeia have decided, beginning with January, 1916, whisky and brandy shall no longer officially be recognized as a medicine in the United States Pharmacopoeia. These cold-blooded scientists have reached the conclusion that even as a stimulant for medical purposes, it is a failure. The after-effects are so deleterious that other stimulants which are not followed by these evil results should be substituted.

Alcohol penetrates the nerve fibers like chloroform and is a deceptive, habit-forming drug, injuring the drinker and those dependent upon him for support.

This court said in the case of *Crowley v. Christensen*, 137 U. S. 86:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in the abasement which it creates, but as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

See *Mugler v. Kansas*, 123 U. S. 623:

"But surely it will not be said to be a part of anyone's liberty, as recognized by the Supreme Court

times as much in free drinkers and three to fifteen times as much in excessive drinkers compared with abstainers."

Insurance companies give us indisputable facts that the use of liquor shortens the drinker's life. Arthur Hunter, Chairman of the Central Bureau Medico-Actuarial Mortality Investigation, December, 1914, reported statistics gathered from two million lives. It showed that among the men, whose habits were considered satisfactory, but were drinkers of alcoholic liquors, the death rate was fifteen to a thousand, where the death rate would only have been ten had alcoholic liquors not been used. He also stated that the data gathered from these two million lives showed men whose average age was 35, would as total abstainers have an expectancy of life for 32 years more, but the liquor habit had caused a deduction of more than four years.

In *State v. Kansas*, 80 Pacific, at page 989, the court says:

"The commodity in controversy is intoxicating liquors. \* \* \* but the article is one whose moderate use, even, is taken into account by actuaries of the insurance companies, and which bars employment in classes of service involving prudent and careful conduct, an article conceded to be fraught with such contagious peril to society that it occupies a different status before the Courts and the Legislature from other kinds of business."

The Mortality Statistics published by the Census Bureau of this Government clearly demonstrate the deleterious character of the commodity in question and the necessity for Federal legislation, which will safeguard and protect our people from the evil effects arising from the use of intoxicating liquors.

It is a fact within the common knowledge of all that the male population is more addicted to the use of intoxicating liquors than the female population. The result of this use of intoxicating liquors of the male population in excess of the use thereof by females is written, by the hand of death in our Mortality Statistics.

While the male and female population are practically the same, the number of deaths of the two divisions are widely different, and this difference is becoming greater and greater as the years go by.

In order that the Court may fully understand the serious consequences resulting from the use of intoxicating liquors by our people, we attach a table taken from the Mortality Statistics, published by the Census Bureau for the years 1906, 1908, 1910, 1912 and 1913, being the last year for which we could obtain these figures showing the number of deaths of males and females, and total number of deaths within the registration area of the United States for the respective years. This area has been considerably increased during this period of time. It will therefore be necessary to take the per cent of increase in order to make a proper comparison.

We have selected nine of the causes of death in which the use of intoxicating liquors, according to the most modern medical testimony, contributes most largely, to-wit:

Alcoholism, homicide, suicide, paralysis of insane, cirrhosis of liver, venereal diseases, angina pectoris, ulcer of the stomach and epilepsy.

We have given these in the order in which they are affected by the use of intoxicating liquors, beginning with alcoholism, the most potent cause of those named.

We herewith attach table No. 2, giving the number of deaths in the registration area for the years 1906 and 1913, for these nine causes, by sex.

We also attach table No. 3 giving the total number of deaths for these nine causes by sex for the years 1906, 1908, 1910, 1912 and 1913, together with the per cent of gain for each of these years over the preceding year given.

From these tables it will be observed that the increase in the number of deaths reported in 1913 over 1906 for males was 36.2 per cent. This included, of course, the increase in population as well as the increase by addition of new territory added to the registration area.

While this increase was 36.2 per cent for the male population, the female population for the same period and in the same registration area only increased 34.6 per cent, but for the same period of time for the nine diseases named, the increase for the male was 68.9 per cent, or 32.7 per cent excess of the increase of the male deaths for all causes; the female deaths for the same causes for said period increased 52.7 per cent, or 18.1 per cent in excess of the gain per cent of deaths for all causes during said period in the registration district.

When to these nine causes we add the other causes of death unto which the use of intoxicating liquors is a large contributing factor, for instance, typhoid fever, pneumonia, diseases of the heart and arteries, etc., we can then realize why it is that in the year 1913, the death rate in the registration area of the United States was 87,408 more males than females.

As this area included a little less than two-thirds of the population of the United States, it is evident that there were between 130,000 and 140,000 more males died in this nation in that year than females, and this difference is largely caused by the use of intoxicating liquors. Not only is this enormous excess of death of males over that of females confronting us as a people, but that it is increasing at a much greater rate than the increase of population.

Old Mother Nature is rebelling as she always does, and through the Mortality Statistics of our government she is calling with pathetic eloquence for a remedy that will eliminate and eradicate this evil from among our people.

The National Congress has heard this call. She has answered it in part with the legislation now in question. It is now for the Judicial Department of this Government to place the seal of its judicial approval upon this step of progress that will assist in at least minimizing this evil.

TABLE NO. 1

	Males	Females	Total
1906 .....	358,286	299,819	658,105
1908 .....	375,497	316,077	691,574
1910 .....	439,757	365,655	805,412
1912 .....	459,112	379,139	838,251
1913 .....	489,128	401,720	890,848
Per ct. gain from 1906 to 1913	36.2	34.6	35.4

TABLE NO. 2

	1906		1913	
	Males	Females	Males	Females
Alcoholism .....	2,390	317	3,326	418
Homicide .....	1,647	454	3,690	877
Suicide .....	4,521	1,332	7,709	2,279
Paralysis of insane ....	1,948	961	3,208	1,163
Cirrhosis of liver .....	4,036	2,043	5,788	2,709
Venereal diseases .....	1,266	810	2,869	1,720
Angina pectoris .....	1,640	1,110	2,878	1,714
Ulcer of stomach .....	731	692	1,483	1,053
Epilepsy .....	1,040	823	1,523	1,109
Per cent gain .....			68.9	52.7

TABLE NO. 3

	Per cent		Per cent	
	Males	Gain	Females	Gain
1906 .....	19,219		8,542	
1908 .....	22,324	16.7	9,342	9.4
1910 .....	25,930	15.7	10,768	15.3
1912 .....	29,876	15.2	12,270	13.9
1913 .....	32,474	8.7	13,042	6.3

### CONGRESS MAY DO LESS THAN ENTIRELY PROHIBIT THE TRAFFIC IN INTOXICATING LIQUORS THROUGH INTERSTATE COMMERCE.

If Congress has power to prohibit entirely the traffic in intoxicating liquors from interstate commerce, it naturally follows that the larger power includes the lesser:

The States have power to entirely prohibit the liquor traffic, but this does not prevent them from prohibiting the traffic in part. This principle was laid down in the case of

Ohio *ex rel* Dollison 194 U. S. 445 and in *Ripley v. Texas*, 193 U. S. 504, where the court said:

"But the State has power to prohibit the sale of intoxicating liquor altogether, if it sees fit. \* \* \* That being so, it has power to prohibit it conditionally. It is true the greater does not always include the less. \* \* \* In general the rule holds good, it does here."

In discussing this question, the Supreme Court of Alabama, in *Sou. Ex. Co. vs. State*, 66 Southern 122, said:

"While intoxicating liquor is property and an object of constant commerce, it is, as we have already said, an article which is made the subject of some kind of police regulation in every State of the Union. These police regulations are not, it is true, uniform in the various States, but all the States have them. There is, therefore, a field for the operation of the Webb-Kenyon law in every State of the Union; and if the Federal Constitution, under which the government was established and which, to use the language of the Supreme Court of the United States in the *Legal Tender* cases, 110 U.S. 241, 14 Sup. Ct. 122, 28 L. Ed. 204, was 'intended to endure for ages and to be adapted to the various crises of human affairs, and not to be interpreted, with the strictness of a private contract,' then it would seem that, in adopting the Webb bill, Congress was exercising, not an implied, but an express power conferred upon it by the Constitution."

And on page 124 of the same opinion:

"The power to control includes the power to limit. Congress in the Webb law, has simply placed a limitation upon commerce insofar as intoxicating liquors are concerned, and as a part of such limitations requires common carriers to refuse to accept, for transportation, or to deliver to the consignee that which is 'forbidden commerce.'"

In the case of *American Express Company vs. Beer*, 65 Sou., on page 581, the court said:

"\* \* \* A power to wholly exclude a commodity from interstate commerce necessarily embraces within it the power to exclude it partially or when certain

conditions exist. *Wickersham vs. Rahrer*, 140 U. S. 545; 11 Sup. Ct. 865; 35 L. Ed. 572. Therefore it seems clear that Congress was well within its power in declaring it would be unlawful to transport into a State intoxicating liquor that is intended by any person interested therein to be received, possessed, sold, or in any manner used \* \* \* in violation of any laws of such state," and on page 582 we find:

"It is true, that misery, pauperism and crime largely 'have their origin in the use or abuse of ardent spirits, \* \* \* that the public health, the public morals, and the public safety must be endangered by the general use of intoxicating drink, \* \* \* that the idleness, disorder, pauperism and crime existing in this country are, in some degree at least, traceable to this evil,' and since 'there is no inherent right in a citizen to sell intoxicating liquors,' it not being 'a privilege of a citizen of the State or a citizen of the United States,' it would seem that the power of Congress to declare that it is not a legitimate subject of interstate commerce is beyond question."

In the case of *State vs. U. S. Express Company*, 145 N. W., on page 458, the Iowa court said:

"There can be no doubt that Congress, in virtue of its power over interstate commerce might, in its discretion, put its ban upon all transportation of liquors in interstate shipment, just as it has done with lottery tickets, the shipment of liquor to Indians, the method of shipment by express companies, the shipment of game, the carriage of infected live stock, the white slave traffic, etc. All of these and other like acts were passed to aid States which came within these provisions in the enforcement of local laws which they deemed of vital importance to their citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction and, if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not do less, and forbid the shipment under certain conditions."



In the case of *State vs. Doe*, 139 Pac., on page 1170, the Supreme Court of Kansas said:

"Intoxicating liquors belong to a class of commodities which may be made contraband at the will of Congress. Congress might, if it chose, altogether prohibit the transportation of such liquors in interstate commerce by placing them in the same category with lottery tickets, obscene literature, adulterated foods and drugs, diseased animals, and women and girls going from one State to another for immoral purposes. \* \* \* The plenary power of Congress includes the lesser power to permit interstate commerce in intoxicating liquors so far and under such conditions as Congress may determine."

Those who oppose this legislation ought not to complain because Congress is not exercising all of its power. Congress has prohibited through interstate commerce, simply the outlawed traffic in the State. Such action on the part of Congress is not only reasonable but necessary, if the laws are to be enforced. To deny the States this right, would necessitate the prohibition of all traffic in liquor from the privileges of interstate commerce, and the second condition would be infinitely worse for the liquor interests and would be of no particular benefit to those who are seeking only to protect dry territory from the outlawry of liquor dealers in other States, and are now using interstate commerce as a weapon to destroy law and order in communities where the people are making an honest effort to maintain it.

#### THE FEDERAL CONSTITUTION GIVES NO GUAR- ANTY TO A CITIZEN TO RECEIVE AND POSSESS INTOXICATING LIQUOR FOR HIS OWN USE.

Unless there is found in the Constitution of the State some provision guaranteeing to an individual the right to receive or possess liquor for his own use, such right is not guaranteed by any provision of the Federal Constitution.

The case of *Mugler v. Kansas*, 123 U. S. 623, in which the opinion written by Justice Harlan completely answers and refutes all arguments advanced by the plaintiff in this case. In the *Mugler* case, *Mugler* was indicted and convicted for manufacturing liquor for his own personal use. Justice Harlan, for the Court, says:

"And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general and sought to be accomplished, the entire scheme of prohibition of Kansas might fail, if the right of liquors for its own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights or liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. *Crowley vs. Christensen*, 137 U. S. 86."

In *Preston v. Drew*, 33 Maine, 558; 54 A. Dec. 639, cited in the majority opinion in *Eidge v. Bessemer*, 164 Ala. 594, *Shepley S. J.* said:

"The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction."

"It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce by a greater use serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience of law; to disturb the peace and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a Legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In the North Carolina case of *So. Ex. Co. v. High Point* (N. C.) 83, S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

"There is nothing in the State or Federal Constitution which prohibits the people of North Carolina, speaking through the Legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, it following that the Legislature can equally prohibit the importation of such liquors by any person for his own use; and a fortiori it can forbid a common carrier, to bring in or import such liquors, irrespective of whether it is for the consignee's own use or not."

The Supreme Court of Alabama in case of *Southern Express Co. vs. Whittle*, 69 Sou. Rep. 652, said:

"The government does not interfere with or impair any one's constitutional rights of liberty or of property, when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. \* \* \* Those rights are best secured, in our government, by the observance, upon the part of

all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.' *Mugler v. Kansas*, 123 U. S. 623, 662-3. Neither the Fourteenth Amendment, nor any other, 'was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people.'

The Supreme Court of Idaho, case of *Ex Parte Crane* 151, Pac. Reporter, page 1006, recently passed upon the constitutionality of their law, which is as follows:

"Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act."

"The only means provided by the act for procuring intoxicating liquors in a Prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whisky or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited."

The court quoted the decision of *Mugler vs. Kansas* and then said:

"Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

The position of the court is clearly correct because the prohibition of the sale and the possession of liquor is the

means for facilitating its use. If the legislative department of government decides that possession is detrimental to the public welfare, such legislative discretion should not be overthrown by the judicial department of government.

Are the laws of West Virginia prohibiting the manufacture of intoxicating liquors by a citizen for his own use, the sale of such liquors in this State, constitutional and valid only so long as a way is left open for the securing by a citizen of the State of intoxicating liquors elsewhere, either in the United States or in some foreign country?

If a person has a constitutional right to purchase intoxicating liquors for his personal use, the seller would have the constitutional right to sell it to a person for such purchaser's personal use; and yet, it is settled beyond a doubt that no one has a constitutional right to sell intoxicating liquors. Such a right is not one of the rights of a citizen of a State or a citizen of the United States.

In the foregoing citation from *Mugler v. Kansas*, the Supreme Court of the United States declared that if in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat, the efforts of the people against the evils attending the use of such liquors, it is not for the courts to disregard legislative determination on that question. The court then proceeded to show that so far from such regulation having no relation to the general end sought to be accomplished, the entire scheme of Prohibition as embodied in the laws of Kansas might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized.

Precisely the same line of reasoning is applicable when we come to deal with the alleged right of a citizen to purchase and import for his own use such quantities of liquor as he might desire.

Therefore, in order to accomplish the admittedly valid main purpose it is necessary for the State under its police power to have the right to forbid the reception or possession

of liquors even for the use of the citizens. This is a step which has a fair relation to the end to be accomplished; in fact, it is necessary for the accomplishment of the main purpose.

If the decision rendered in the *Mugler* case was correct, it necessarily follows for the same reason that the State has the right to deny to a citizen the right to have intoxicating liquors brought into the State even for his own use, since to allow him to do so might thwart the State in the exercise of a power which is conceded to exist.

THE PURPOSE OF ALL LEGISLATION RESTRICTING AND PROHIBITING THE SALE OF LIQUOR IS TO DISCOURAGE AND PREVENT ITS USE.

Opposing counsel have assumed that the State did not want to interfere with the use of liquor because statutes have not been passed, specifically prohibiting the use of liquor or the purchase of liquor. There is good reason why the States have followed the policy outlined.

The government has found that the best way to prevent the use of liquor is to cut off the means for furnishing the liquor to the individual for his use. When the law prohibits the sale of liquor, many people who have heretofore used it, discontinue its use. In many places the people have found it necessary to prohibit the furnishing and giving away of intoxicating liquor. This further discourages and prevents the use.

In order to meet the many evasions of the law, still other legislation was required. If anyone had a constitutional, inherent right to use liquor, then all of these laws which prevent the sale and furnishing of liquor would be unconstitutional. On the other hand, all of those laws prohibiting the sale or furnishing of intoxicating liquors have been upheld. If a State finds that it is necessary in order to eliminate the further use of liquor, to prohibit the shipments of liquor into dry territory, the same reason which sustained the former laws upholds this legislation

The strongest reason for prohibiting the sale or distribution of liquor is to discourage and prevent its use. There can be but one purpose in passing these laws, and that is to prevent the use of intoxicating liquor.

In *State vs. Maine* 20 L. R. A., 496, the court said:

**"It is common knowledge that it is the use of intoxicating liquor as a beverage that is deemed hurtful and is the mischief sought to be prevented by the legislation. The prohibition of the sale of intoxicating liquors is only a means; the end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the State. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows." \* \* \***

Taken in connection with the other legislation, its evident purpose is to further the ultimate purpose of all that legislation, viz.; to diminish the use of intoxicating liquor as a beverage.

*Ex Parte Crane*. 151 Pac. Rep. 1006.

The court, after quoting *State vs. Gilman*, 33 W. Va. 146, and *State vs. Williams*, 146 N. C. 618, and *Com. vs. Campbell*, 133 Ky. 50, said:

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

"The fact is that the harm consists neither in the possession nor sale but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that if the citizen may be prohibited from having liquor in



his possession he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession (quoting *Mugler v. Kansas*) that the manufacture for use would tend to cripple the effort to guard the community against the ends sought to be remedied."

*Lincoln vs. Smith*, 27 Vermont, 320 at 337.

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

"If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals, and productive of pauperism and crime; it seems to us that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations. The legislation in passing the law in question doubtless supposed that the traffic and drinking of intoxicating liquors went hand in hand and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that by cutting off the one the other would also fall with it.

*Marks vs. State*—159 Ala.—71, at page 84.

"The main object and purpose of all is the same \* \* \* to promote temperance and prevent drunkenness. \* \* \* The evil to be remedied is the use of intoxicating liquors as a beverage \* \* \* and the object of the law in this particular must not be lost sight of in its interpretation."

See also *State vs. Delaye*, 68 S. 995, in which the court quotes the preamble of the act in question as a guide in their interpretation:

"Whereas it is the public policy of this State to discourage the use and consumption of prohibited liquors, etc.

"So. Exp. Co. vs. Whittle, 69 So.—652. The object and purpose of all laws governing the subject of intoxicating liquors is 'To promote temperance.' The evil to be remedied is the use of intoxicating liquors as a beverage.

State vs. Phillips, 67 So. 651.

"The ultimate purpose and end of prohibition is to prevent the use of liquors as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step the way will be found to accomplish the end."

The United States Circuit Court of Appeals, 4 Cir. Fed. Rep., Vol. 219, No. 4, April 1, 1915, said on this question:

"In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power, rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

There is no proposition better settled than the above. It is for the purpose of diminishing, discouraging and preventing the use of liquor as a beverage that all of these laws are enacted.

#### WEBB-KENYON LAW VALID AS A POLICE REGULATION

Freund in his work entitled "Police Power, Public Policy and Constitutional Rights," says:

"The Federal exercise of the police power through positive legislation rests upon the enumerated powers of Congress under the Constitution. The principal power looking to the promotion of the internal public welfare is that of regulating commerce with foreign nations and among the States. The power to regulate commerce includes the power to prohibit and suppress objectionable forms of traffic. Under this power Congress has also legislated regarding shipping and navigation, interstate common carriers, and combinations in restraint of trade.

**"In view of all this legislation, it is impossible to deny that the Federal government exercises a considerable police power of its own. This police power rests chiefly upon the constitutional power to regulate commerce among the States and with foreign nations, but not exclusively so."**

The United States has exercised an ample police power over Indians partly under the commerce clause of the Constitution.

In the *Rahrer* case, 140 U. S. 345, it was said in sustaining the Wilson act that that act was:

**"Enacted in the exercise of its police powers and is constitutional and valid."**

The lottery case above referred to holds that the Wilson act was sustained in the *Rahrer* case:

**"As a valid exercise of the power of Congress to regulate commerce among the States."**

In the *Addyson* case (175 U. S. 211) the power of Congress is affirmed to regulate interstate commerce to any substantial extent. In the lottery case the power to regulate is put to the essential test whether the legislation is for the purpose of regarding the morals of the people of the nation or involves that purpose.

**"It may be said in a general way that the police power extends to all the great public needs." Canfield v. U. S. 167, 518, 42 L. Ed. 260.**

**"It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong**

and preponderant opinion to be greatly and immediately necessary to the public welfare." Holmes J. in *Nobles State Bank v. Haskell*, 219 U. S. 104, 55 L. Ed. 112.

In *Phalens case* (8 How. 161, 168) it is observed "that the suppression of nuisances, injurious to public health or morality, is among the most important duties of government."

In the case of *Hoke v. State*, 227 U. S. 309:

**"Congress may adopt not only the necessary, but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulation.**

"Congress is given power to regulate commerce with foreign nations and among the several States. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercise of it and made a ground of attack. The present case is an example. \* \* \*

"Our dual form of government has its perplexities. State and nation have different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women and more insistently of girls."

Congress in this instance has not even felt compelled to resort to "convenient" means in the exercise of its power. It has used only such power as is necessary to provide for the enforcement of law. If Congress had used its complete discretionary power, all liquors would have been denied the privilege of interstate commerce. In other words, Congress has the same power and discretion to deal with interstate commerce by enacting police regulations that the State has in enacting laws to control, or prohibit, the traffic.

LEGISLATIVE POWER MAY PROHIBIT ACTS INNOCENT IN THEMSELVES IF THE LAW-MAKING BODY THINKS THE ADMITTED EVIL CANNOT BE PREVENTED EXCEPT BY THE ENACTMENT OF SUCH A LAW.

It is well settled in law that when authority is given the Legislature or Congress to pass a law, it carries with it also authority to pass any additional legislation to make the law enforceable. This proposition is also re-enforced to the legislation now under consideration by the United States itself. Clause 18, section 8, article 1, specifically gives to Congress power to make all laws which shall be necessary and proper for carrying into execution the power given in passing interstate commerce laws. Authority is given Congress to pass a law controlling interstate commerce, and this carries with it the power to eliminate from interstate commerce any article which Congress deems to be detrimental to public morals or public health. There are many authorities for the proposition that laws may be passed by the Legislature or by Congress to make effective existing legislation. One of the familiar lines of authorities is that which prohibits non-intoxicating liquors to be sold, when the only authority given in the Constitution is to regulate or prohibit intoxicating liquors. The court upholds the law on the ground it is necessary to include innocent acts often in order to prevent the evils admitted. No one will deny that the States have full power to prohibit the manufacture and sale of intoxicating liquors. No authority

is given for the State to prohibit non-intoxicating liquors. The courts, however, have upheld such legislation because it was necessary to enforce law. The same principle is involved in national legislation in dealing with the liquor traffic.

In the case of *United States vs. Cohn*—Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. The opinion at length discussed the right of the States in the exercise of their police power to prohibit the sale of such beverage and decides that whatever the States may do in that behalf, Congress may do for the territories. After quoting the statute at length, the court said:

"No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter. \* \* \* Congress evidently had some purpose in thus changing the ordinary and common use of language."

In *State vs. Frederickson*, 101 Me. p. 37, the court reaffirms this proposition as follows:

"The liquors above enumerated are declared intoxicating by law. In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact. As was well said in *State v. Connell*, 99 Me. 61: 'It is not for the jury to revise the judgment of the Legislature and determine whether a liquor is or is not intoxicating.' When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and its non-intoxicating character, as a matter of fact, becomes entirely im-

material with respect to the application of the statute. *Commonwealth vs. Bloss*, 116 Mass. 36; *Com. vs. Athens*, 12 Gray 29; *Com. vs. Brelsford*, 161 Mass., 61; *State vs. Piche*, 98 Maine 348; *State vs. O'Connell*, 99 Maine, 61; *Com. vs. Show*, 133 Mass. 575; *State vs. Intoxicating Liquors*, 76 Iowa, 243; *State vs. Guinness*, 16 R. I. 401."

This power has frequently been used both by the State and Federal government to make effective, legislation which has been legally enacted. The following are a few of the many citations illustrating this principle, and showing the extent to which it has been sustained by the State and Federal courts:

*Elder v. State*, 162 Ala. 41.  
*State v. George*, (La.) 67 South 953.  
*Feibleman v. State*, 120 Ala. 122.  
*Dinkins v. State*, 149 Ala. 49.  
*Lambee v. State*, 151 Ala. 86.  
*Eaves' case*, 113 Ga. 749, 39 S. E. 118.  
*O'Connell's Case*, 99 Maine 61, 58 Atlantic 59.  
*United States v. Cohn*, 32 S. W. 38.  
*Pennell v. State*, 123 N. W. 115.  
*State v. Walder*, 83 Ohio St. 68, 84.  
*State v. Frederickson*, 101 Maine 36, citing.  
*Com. v. Blose*, 116 Mass. 36.  
*Com. v. Athens*, 112 Gray, 29.  
*Com. v. Brelsford*, 136 Mass. 61.  
*Com. v. Piche*, 98 Maine, 348.  
*Com. v. Show*, 133 Mass. 575.  
*State v. O'Connell*, 99 Maine 61.  
*State v. Intoxicating Liquors*, 76 Iowa, 243.  
*State v. Guinan*, 66 R. I. 401.

The latest and most convincing decision upon this question is that of *Purity Extract & T. Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184; 187, involving the right of the State of Mississippi to prohibit a non-intoxicating malt liquor called "Poinsetta." It is logical, convincing and decisive on the point in question. Justice Hughes, speaking for the court, said:

"That the State, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is



undoubted."—*Bartmeyer v. Iowa*, 18 Wall, 189, 21 L. Ed. 929; *Boston Beer Co. Mass.*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley v. Christensen*, 137 U. S., 86, 43 L. Ed. 620, 11 Sup. Ct. Rep. 12. "It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government." *Booth v. Illinois*, 184 U. S. 425; 46 L. 623, 22 Sup. Ct. Rep. 168; *Ah Sin v. Wittman*, 198 U. S. 500, 504, 49 L. Ed. 1142, 1144 25 Sup. Ct. Rep. 756; *New York Ex rel, Silz v. Hesterberg*, 211 U. S. 31, 63 L. Ed. 75, 29 Sup. Ct. Rep. 10; *Murphy v. Calif.*, 225 U. S. 623; 56 L. Ed. 1229, 32 Sup. Ct. Rep. 697. "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

It would be difficult to find a more appropriate exercise of law-enforcement power than the Webb-Kenyon law. It not only deals with intoxicating liquor, which is admittedly a proper subject matter to be controlled by such power, but to make the exercise of such power more appropriate, it deals only with outlawed liquors. When Congress is given power over the subject matter of liquor in interstate commerce, it necessarily includes power to deal with such liquors as are outlawed by the States.

CASES CITED BY APPELLANT MAY BE  
DISTINGUISHED

In appellant's brief upon the former hearing, it was claimed and it doubtless will be again claimed, that the Kentucky cases, *Com. v. Campbell*, 133 Ky. 60, and others following it, *Williams v. State*, 146 N. C. 618, *Eidge v. Bessemer*, 164 Ala. 599, and *State v. Gilman*, 33 W. Va. 146; support appellant's contention that under constitutional government in the United States no government has the right to deny to a citizen the right to obtain intoxicating liquors for personal use, or as complainant's counsel will probably state it, that no Government has the right to regulate the personal habits of adult citizens not under disability.

Since the first hearing of these cases before the Court, the cases from three of the States afore noted have been explained, modified, or limited, in such a way that they no longer lend support to appellant's contention. We later refer to and consider the Kentucky cases; it is desirable now to briefly review the other cases named above:

## (1.)

**STATE v. GILMAN, 33 WEST VIRGINIA, 146**

In *State v. Sixo*, decided by the Supreme Court of Appeals of West Virginia, November 30, 1915, the Court called attention to the fact that the *Gilman Case* was decided under the previous Constitution, whereas the Prohibition amendment effective July 1, 1914, had prohibited the manufacture and keeping for sale of malt, vinous, spirituous liquors, etc., and required the Legislature to "enact such laws with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of this section," and in that connection, the Court said that it does not follow from the decision in *Gilman's case*, "that the Legislature, in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be

brought into the state, or carried from one place to another within the state;" and it cites with approval the case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, declaring the well-settled doctrine of this Court, in the following language:

"It does not follow that because a transaction separately considered, is innocuous, it may not be included in a Prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

In *State v. Phillips*, (Miss.) 67 So. Rep. 651, the Supreme Court of Mississippi thus wrote concerning the *Gilman* case:

"In *State v. Gilman*, *supra*, the Supreme court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors for another by any person not the owner, who had obtained a license therefor. The decision went off upon the Court's interpretation of the State Constitution, which declared "laws may be passed regulating or prohibiting the sale of intoxicating liquors, the Legislature was without power to pass the statute. The Court also held that the statute could not be upheld as coming within the police power of the State. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering, and besides the question before the Court was complicated by the Constitution of West Virginia."

In the *Gilman case*, decided November 9, 1889, two questions were considered: (1) Whether the statute prohibiting one from keeping in his possession liquors for another was violative of the Fourteenth amendment of the Federal Constitution, and (2) Whether it was violative of a provision in the then State Constitution, declaring that laws may be passed regulating or prohibiting the sale of intoxicating liquors within the State. The decision on the second

ground is without value now, because the constitutional provision has been superceded by the Prohibition amendment of West Virginia effective July 1, 1914. In so far as the decision was rested on the Fourteenth amendment of the Federal Constitution, it cannot now be accepted for several reasons. It is entirely out of harmony with subsequent decisions of the Supreme Court of the United States, and particularly with the case of **New York v. Hesterberg**, 211 U. S. 31, and **Patsone v. Penn.**, 232 U. S. 138. Furthermore, in **State v. Davis**, No. 2864, decided November 30, 1915, the Supreme Court of West Virginia said in regard to a statute prohibiting the advertising of liquors:

"A liquor dealer residing and doing business in another State, who by the agency of the United States mails, sends into this state unsolicited and there circulates or distributes to prospective customers, price-lists, circulars, and order blanks advertising his liquors for sale, and which he proposed to ship into this State to them, and which advertising matter by such agency is actually delivered to a citizen of this State, is guilty of a violation of Section 8, Chap. 15, Acts of the Legislature of 1913, known as the Yost law, and may be indicted and punished as provided by such act. . . .

"To so construe said act by virtue of the Acts of Congress known as the Wilson act and Webb-Kenyon act, does not infringe on the commerce clause of Section 8, Article 1, of the Federal Constitution.

"Nor does the provision of Section 8 of said Act of 1913 so construed and applied, violate the privileges and immunities clause of the Fourteenth amendment of the Federal Constitution."

(2.)

#### **EIDGE v. BESSEMER, 164 ALABAMA, 599**

This case was distinguished in former hearing, but since then it has been destroyed as any authority here by the later decision of the Supreme Court of Alabama in **Southern Express Co. v. Whittle**, 69 So. Rep. 682, decided June 17, 1915.

In that case the Supreme Court of Alabama held that it was competent for the Legislature of Alabama to pass a statute limiting the quantity of liquor that a citizen might receive or possess for personal use, and further that the State had the same right under the police power to totally prohibit receipt and possession or importation of liquor, that it had to prohibit its manufacture.

The Court dealt specifically with the **Eidge case** and explained that it could not be regarded or accepted as a governing authority in the case then in hand, for the several reasons stated, one of which was that the **Eidge case** dealt with an ordinance of a Municipality and not with a statute of the State—the ordinance going beyond and in advance of any State statute then of force.

It is interesting to note also that the Supreme Court of Alabama in the **Whittle case** disapproved the majority view in the case of **State v. Williams**, 146 N. C. 618 and stated that it would not follow the case of **West Virginia v. Gilman**, 33 W. Va. 146, since it was opposed to the doctrine or principle in the Alabama case of **Williams v. State**, 179 Ala. 50.

(3.)

**STATE v. WILLIAMS, 146 NORTH CAROLINA 618**

The majority opinion in the above case has been declared unsound by the Supreme Court of Alabama in **Southern Express Co. v. Whittle**, 69 So. Rep. 652, and by the Supreme Court of Mississippi in **Phillips v. State**, 67 So. Rep. 651.

The Supreme Court of North Carolina itself, in the case of **Glenn v. Southern Express Co.**, decided December 1, 1915, has had occasion to consider the **Williams case**. After sustaining the North Carolina anti-shipping law, similar in principle to the Alabama anti-shipping law, and preparatory to following the decision of the Alabama Court in **Whittle's case**, Mr. Justice Allen, speaking for the whole Court, said that the question as to whether common carriers might not be forbidden to transport intoxicating liquors

into Prohibition territory was not decided, but expressly reserved, in **State v. Williams**, 146 N. C. 618. It was then said in the opinion:

"The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principle difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced for sale, and the bringing in of such liquors as being for personal use when intended for sale has been such a prolific source of evasion of Prohibition laws, that restrictions upon the right of delivery into the State are necessary to prevent illicit sales."

The Court then cited with approval the following from **Mugler v. Kansas**, 123 U. S. 623.

"Nor can it be said that government interferes with or impairs anyone's constitutional right of liberty or property when it determines that the manufacture or sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

The argument of the appellant against the West Virginia law is based upon the false assumption that a citizen has a constitutional right to buy or have liquor shipped to him for his personal use. Unless there is some specific provision in the Constitution of the State that guarantees to its citizens this right, then there is no such right. The following propositions are well-settled:

There is no inherent right in a citizen to sell intoxicating liquor as a beverage for personal use, as was held in **Crowley v. Christensen**, 137 U. S. 86.

No one has any constitutional right to manufacture liquor for his own use. **Mugler v. Kansas**, 123 U. S. 623.

No one has a constitutional right to have a solicitor offer to sell him intoxicating liquors for his own use from outside of the State, even though it is contemplated that

an interstate carrier bring the liquor to him. **Delamater v. State**, (S Dak.) 205 U. S. 93.

No one has a constitutional right to have liquor advertisements sent to him, in order that he may buy liquor for his own use. **State v. Delaye**, 69 So. Rep. 993.

All anti-liquor prohibitory statutes are designed to reduce, restrict, or prevent the personal use or consumption of intoxicating beverages.

As the Supreme Court of Mississippi well said in **State v. Phillips**, 67 So. Rep. 651.

"If the object of Prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no particular difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, **except the evils which flow from the drinking of intoxicating beverages.** If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of Prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

#### THE NECESSITY FOR AND PURPOSE OF THE WEBB-KENYON ACT

For half a century prior to 1888, the Courts recognized the jurisdiction of the State over interstate shipments of liquor from the time they entered the state, the same as other domestic liquors. This policy was reversed in the case of **Bowman v. Northwestern**, 125 U. S. 500, and in the subsequent case of **Leisy v. Hardin**, 135 U. S. 124. In reversing this policy, the Court predicated its announcement,



not upon the inability of Congress to act in the premises, but on the ground that inasmuch as Congress had enacted no law restricting or limiting interstate commerce, it was its desire "that such commerce shall be free and untrammelled."

The Wilson act followed very soon after the decision of *Leisy v. Hardin*, 135 U. S. 124, 34 L. Ed. 128; and the construction placed on the Wilson act in *Rhoades v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, started the movement for further congressional relief that would enable the States to enforce their laws, and notably their police laws, without infringing upon the right of Congress to regulate commerce. The use of the words "received, possessed, sold, or in any manner used in violation of any law of such State, etc." shows Congress intended to recognize to the fullest extent whatever valid State laws might be enacted prohibiting or regulating the receipt, possession, sale or other use in any manner, of the liquors mentioned in the act.

Whereas under the Wilson act, interference by the State could not occur until after delivery to the consignee whereby under the commerce clause of the Federal Constitution the consignee had the right to order and receive such liquors for his own use (*Vance v. Vandercook*, 170 U. S. 428, 42 L. Ed. 1100), now, under the Webb-Kenyon law, shipment into a State is prohibited by Congress if any person interested therein intends to receive, possess or in any manner use, as well as to sell such liquor in violation of the State law.

In the case of *West Virginia v. Adams Express Co.* 219 Fed. Rep. 794, paragraph 13 of the opinion, the Court dealt with the contention that was made by opposing counsel, to the effect that the quoted language of Mr. Justice White in *Vance v. Vandercook Co.* 170 U. S. 438, gave countenance to the notion that Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a Prohibition State, but the Court said in reference to the quoted language, that:

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally, deleterious substances."

This idea is later on further elucidated by Justice White in *American Express Co. v. Iowa*, 196 U. S. 133; 49 L. Ed. 417, where after stating the points decided in *Leisy v. Hardin & Rhoades v. Iowa*, and stating that the doctrine in those cases was applied in *Vance v. Vandercook Co.* 170 U. S. 438, to the right of a citizen of South Carolina to order from another State for his own use merchandise consisting of intoxicating liquors to be delivered in the State of South Carolina, he said:

"Those cases rested upon the broad principle of the freedom of commerce between the States and the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of a citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in the State where made."

The Webb-Kenyon Act was intended to alter the rules above declared and to relieve the police power of the State from the dominion, under which it had long rested, of the commercial clause of the Federal Constitution. The existence and extent of the police power of the State and the former supremacy of the commerce clause of the Constitution over the police power will be clearly brought forth by considering two paragraphs from the opinion of Chief Justice Fuller in *United States v. E. C. Knight*, 156 U. S., L. Ed. 325, where he said:

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always

belonging to the States, not surrendered by them to the general Government, not directly restrained by the Constitution of the United States, and essentially exclusive.

"On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several States, and if a law passed by a State in the exercise of its acknowledged powers comes in conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme."

The Webb-Kenyon Act removed this conflict between the police power of the State and the exclusive power of Congress to regulate commerce, insofar as intoxicating liquors are concerned, by declaring that such liquors should become outlaws and contrabands of commerce, "when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the State."—Hence, for the first time, from and after March 1, 1913, the States were placed in a position where they could exert their police power to the fullest extent to secure real and effective Prohibition of the liquor traffic within their borders, and to reduce, restrict, or entirely prevent, if they deemed best to do so, the possession, or receipt of intoxicants, unless, of course, there be some provision in their State Constitutions which prevented their exerting their police power to this extent. Congress no longer permits the declared and legal policy of the States, seeking to protect their people against the mischiefs of intoxicating alcoholic poisons, to be overthrown or disregarded by the agency of interstate commerce.

This Court enunciated this safe and fundamental principle in the case of *Champion v. Ames*, 188 U. S. 356, in the following language:

"In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said in effect THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE."

The same reasoning which guided the Court in this great decision can with greater force be applied to the case at bar. The people of the States in their struggle to advance civilization and eliminate this great evil have prohibited the liquor traffic in the smaller units of Government and in 19 of the States. They made this advancement on the theory that the electorate in every unit of Government have an inherent right to better their conditions whenever the legally constituted majority in such territory desire so to do in a legal manner. As civilization advances, new conditions arise. Old customs, and traffics, which were once permitted and sanctioned, under the searchlight of truth and science are found to be injurious and are eliminated. Our Constitution, as the Supreme Court of Kansas has well said, has the marching quality in it. It opens the way for progress when the people are ready for it. Through decades of hard work, and great sacrifice the electorate have abolished the liquor traffic in 80 per cent of the area of this country. At each step of advancement they have been met by the stubborn opposition of the liquor interests. Every attempt to further curtail the liquor traffic was met by some new scheme to

evade the law. Their last refuge is the interstate commerce provision of the Constitution.

After the saloon and beverage traffic is prohibited in a State, the liquor interests use the railroads and express companies as their bartenders to force their liquor into this territory. To require the officers of the State to wait until the liquor is delivered and then watch for an overt act of lawlessness, is placing an unreasonable and unnecessary burden upon the officers and the people who have done their best to free themselves from what they consider a curse.

Surely the State is entitled to this much protection from the Federal Government. It was granted to the States in the case of lotteries and it did not cause a fraction as much crime and misery and poverty as the liquor traffic produces. Even more consideration should be given States in combating the evils of the liquor traffic than was granted to them in suppressing the evils of lotteries.

Congress has granted this relief and the States have received a new impetus in their handicapped effort to enforce the law. It is inconceivable that a great Nation like this whose fundamental purpose is to promote the general welfare should allow any of the States to be crippled in their effort to enforce laws for the public good.

The Federal Constitution was never intended by our forefathers to be an instrument to protect lawlessness. It has always been construed so as to aid officers in the performance of their duties in enforcing law.

## 15

### PUBLIC POLICY AND THE PRESUMPTION OF CONSTITUTIONALITY

Unless there is such conflict between the law and the Constitution that cannot be reconciled, it should be sustained.

In *United States v. Harris*, 106 U. S. 635; 27 L. Ed. 290; Mr. Justice Woods, speaking for the Court said:

"Proper respect for co-ordinate branch of the Government requires the Courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

In *A. T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909, Mr. Justice McKenna said:

"It is also a maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purposes of promoting the interests of the people as a whole, and Courts will not lightly hold that an act duly passed by the Legislature was one in the enactment of which it transcended its powers."

In *Brown v. Walker*, 161 U. S. 590; 40 L. Ed., 819, Justice Brown, speaking for the Court, says:

"That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supported fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in *Fletcher vs. Peck*, 10 U. S. 88; 3 L. Ed. 162, the 'opposition between the Constitution and the law be such that the Judge feels a clear and strong conviction of their incompatibility with each other.'"

In *United States v. Gettysburg Elec. R. Co.*, 160 U. S. 668; 40 L. Ed. 576, the Court speaking through Mr. Justice Peckham said:

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such an act is presumed to be valid unless its invalidity is plain and apparent; no presumption or invalidity can be indulged in, it must be shown clearly and unmistakably. This rule has been stated and followed by this Court from the

foundation of the Government. \* \* \* That an act of Congress which plainly and directly tends to enhance respect and love of a citizen for the institution of his country, and to quicken and strengthen his motives to defend them \* \* \* must be valid."

The above decisions, and many others, have given assurance to the people that when they are striving to promote the public good and the sobriety and welfare of the people, that laws reasonably adapted to carry out that purpose will be sustained. Public sentiment, and the overwhelming majority of Congress, agreed that the outlawed liquor traffic should not have Federal protection through interstate commerce. Such a law is reasonably adapted to the end sought. The State of West Virginia has prohibited the manufacture and sale of liquor for beverage purposes. In order to secure the benefits of their organic statutory law, they found it necessary to prevent the soliciting of orders through the mails, the possession and receipt of intoxicating liquor through common carriers.

All of these laws have a direct bearing upon the main purpose sought, namely, to promote sobriety among the citizenship of the State, and to limit and discourage the use of intoxicating liquor. When it is conceded that the State may prohibit the manufacture, sale and distribution of intoxicating liquor as a beverage within the State, it logically follows that to make those laws enacted under the police power effective, the means for securing liquors from outside of the State must be inhibited also by the legally constituted authority, to-wit; Congress. The Federal legislative authority has enacted the law to divest such outlawed liquors of their interstate character. The State, under the authority of the new Constitution and police power, has wisely used its discretion in prohibiting practically every phase of the beverage traffic. This furnishes us what Justice Johnson called in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat, 1—"A frank and candid co-operation for the general good."



## THE PROTECTION OF PUBLIC HEALTH AND PUBLIC MORALS A NECESSITY

It is well settled that the safeguarding of the public health and public morals is essential to the perpetuity of Government. Whatever else the police power may include, it admittedly grants to the government the right to protect these two essentials—the public health and the public morals. This necessarily means that the Constitution must be construed, as new conditions arise, so as to carry out its fundamental purpose. This is what the Supreme Court of Kansas had in mind when they quoted in their recent decision from Willoughby on the Constitution:

“The national Constitution, under the guidance of our great Court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of progressing history.”

This theory is in complete harmony with the decision of this Court in the case of *United States vs. Gettysburg*, *supra*, and the application of that case made by the Kansas Supreme Court, to-wit: “It is of as much national importance to make a man sober as to make him patriotic.”

The above decisions deal with the very fundamentals of government. Without public morals, public health and patriotism, government itself would cease to exist. Any law which has reasonable relation to the safeguarding of these fundamentals of government and is not in irreconcilable conflict with the Constitution, must be valid. Relying upon these well recognized principles found in the most enlightened public conscience and Court decisions, the people have patiently and persistently and against great odds opposed the beverage liquor traffic until the following States and subdivisions have outlawed it.

The absolute prohibition of the sale of intoxicating liquors for beverage purposes has been adopted by nine-

*Mont  
Miss  
28* *along*

teen States, Maine, Kansas, North Dakota, Georgia, North Carolina, South Carolina, Oklahoma, Mississippi, Tennessee, West Virginia, Virginia, Colorado, Washington, Oregon, Arizona, Iowa, Idaho, Alabama and Arkansas.

*California*

The Legislatures of twenty-four other States (California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Rhode Island, South Carolina, Texas, Utah, Vermont and Wisconsin) have by law prohibited the sale of intoxicating liquors in certain classes of political subdivisions, prohibition becoming operative whenever a majority of the electors in a regular or special election indicate by vote that they wish the provisions of the law to apply.

In still other States the Legislatures have arbitrarily placed certain areas under prohibition legislation, thus adding to the aggregate population in prohibition territory. Since September of 1914, ten States have adopted Prohibition. The steady growth of territory which seeks protection from a law like the one in question is shown by the following facts:

Four States dry in 1907;  
Five States dry in 1908;  
Nine States dry in 1909;  
Ten States dry in 1914;  
Nineteen States dry in 1916.

In Utah the Legislature prohibited the traffic. The Governor of the State waited until after the Legislature adjourned, then vetoed the measure. The next Legislature will doubtless enact a prohibitory law. About five other States have fixed dates for elections for a State vote, and most if not all of them will be successful in abolishing the liquor traffic.

Approximately 80 per cent of the territory of the United States has abolished the beverage liquor traffic, and about 57 per cent of the population live in that territory.

With the majority of the people of the States living in dry territory, and an increase of those who live in dry territory amounting to 1,500,000 on the average every year for 20 years, the public necessity for this law is certainly manifest.

As a result of the rapidly growing sentiment against the liquor traffic and the more effective means at hand for enforcing the law, the decrease in the sale and consumption of liquor has been marked the last year. According to the official United States Government Report, published recently by Internal Revenue Commissioner, Mr. Osborne:

"The consumption of fermented liquors decreased for the past year . . . 200,300,436 gallons.

"And the consumption of distilled liquors decreased 14,983,333 gallons.

"Or a total decrease in consumption of all liquors 215,283,769 gallons.

"Estimating the population of the United States at one hundred million, this report shows a decrease in consumption of 2.15 gallons per capita.

"That is the largest decrease in liquor consumption ever reported for any one year in the nation's history."

This report shows a decrease in the number of liquor dealers of 16,270 for the year or at the rate of forty-four per day for the year ending June, 1915.

Should this part of our citizenship, battling against one of the nation's greatest evils, be limited or discouraged in a laudable effort to have laws enforced for an eminently legal purpose? The power to reach violations of law must be lodged somewhere in government. The State has prohibited the traffic and all of the incidents of the traffic which produce the recognized evils within their borders. Congress has divested intoxicating liquor of its interstate character when it is shipped into the State in violation of the State laws. Both the Federal and the State government have tried to follow the rule laid down by this Court

in the case of *Hoke vs. State*, 227 U. S. 309, where the Court said:

"Our dual form of government has its perplexities, state and nation have different spheres of jurisdiction as we have said. But it must be kept in mind that we are one people and the powers reserved to the states and those conferred on the nation are adapted to be exercised whether independently or concurrently to promote the general welfare materially or morally."

Both the material and moral welfare of the State of West Virginia are involved in the outcome of this case. In spite of the determined opposition of the liquor interests from outside the State and their effort to break down the enforcement of the law, the public good has been greatly advanced by the operation of these statutes. The public records show crime has been reduced 60 per cent and the arrests for drunkenness 50 per cent in the last year, ending July, 1915. With the aid of this law, if sustained, and the State laws which are involved in this hearing, still greater results will follow.

The material welfare has been advanced equally with the moral welfare. Governor Hatfield recently gave the following testimony concerning the operation of these laws:

"While West Virginia loses about \$700,000 a year in revenue from the saloons, within the next few years we expect to reduce our State expenses for the handling of criminal charges, and the maintenance of state asylums that will offset the loss from the revenue paid for legalizing the saloon traffic.

"We feel that our standard of civilization will be higher, and that the generations to come in West Virginia will be better from the standpoint of strength, intelligence, education and other environments which means so much to the success of a great and growing State, unlimited in natural wealth such as ours, and upon which depends our standard of citizenship as to what the future of our State and its achievements may be."

The States that are making the fight to maintain the standard of sobriety and morality should be encouraged and unhampered. Every reasonable doubt should be resolved in their favor in sustaining a law intended for the public good. This Court has construed the Federal Constitution broadly from time to time as the necessity arose for legislation to eliminate the evils that injure public morals. The same wise, far-seeing policy which has been used in sustaining similar laws in the past will uphold this law. Precedent, reason and enlightened public policy furnish a safe basis for sustaining the constitutionality of the Webb-Kenyon law.

## 17

#### WEST VIRGINIA STATUTES INVOLVED IN THIS HEARING

The provisions of the West Virginia statutes which are in controversy in this hearing are as follows:

The prohibition of the receipt, or possession of intoxicating liquor from a common carrier.

## 18

#### WEST VIRGINIA STATUTES AUTHORIZED AND VALID

The statutes in question are a valid exercise of the police power and of the authority granted in the Constitution of West Virginia.

## 19

#### POLICE POWER

The liquor traffic is peculiarly subject to the police power of the State and there is no inherent right to engage in it, which may not be regulated, or prohibited. The Court decisions are uniform on this one proposition at least, that the liquor business is of a character so menacing to the public welfare that no person can claim an inalienable right to engage in it. No one can complain, if, having chosen this vocation, his business is regulated, or pro-

hibited, by law; whatever the property loss to him may be or whatever means is devised by the State to accomplish such regulation, or Prohibition, so long as such means are reasonable and necessary to affect the purpose designed.

Nowhere is the anomalous character of the liquor business, and the right of the State to deal with it, free from constitutional limitations, State and Federal, which protect other property interests, better stated and defined than in the so-called License cases in 5 Howard, 504. Chief Justice Taney at page 577 put the proposition thus:

"If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

In *Beer Co. v. Mass.*, 97 U. S. 33, it was contended that since the adoption of the Fourteenth Amendment to the Federal Constitution the right to sell intoxicating liquors was secured to citizens in every State, but this Court of the United States swept such a claim aside with the remark that, "so far as such a right exists it is not one of the rights growing out of a citizenship of the United States."

In this same case the contention was made that while the Legislature might prohibit an individual from engaging in the manufacture and sale of intoxicating liquors, a corporation could not be so prohibited because of the contract with the State expressed in its charter. The Beer Company had been organized "for the purpose of manufacturing malt liquors in all their varieties," and insisted that this corporate power granted in their charter could not be taken away. Mr. Justice Bradley, delivering the opinion of the Court, said:

"The right to manufacture, undoubtedly as the plaintiff's counsel contends, included the identical right to dispose of the liquors manufactured, but al-

though this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."

The fact is everywhere recognized that the liquor traffic is not to be treated as an ordinary, legitimate business entitled to equal protection with other pursuits. As the Court says in *State ex rel Judges*, 50 U. J. L., at page 595:

"The sale of intoxicating liquors has from the earliest history of our State been dealt with by the Legislature in an exceptional way. It is a subject by itself, to the treatment of which all analogies of the law appropriate to other topics cannot be applied."

This characterization of the liquor business "as a subject by itself," necessitating treatment by the Legislature "in an exceptional way" is everywhere to be found in the cases. The business of dealing in intoxicating liquors is universally recognized as a vocation suffered rather than favored by the State. To borrow an analogy from the law of torts, the liquor business is to be treated with the respect due to a trespasser upon the premises of society rather than with the care due an invited guest. The property of the saloonkeeper cannot be wantonly or unnecessarily destroyed, nor can arbitrary or needless discrimination be made among or between those engaged in this pursuit; but everything short of this can be lawfully done which the legislative power deems wise and expedient in lessening or eradicating the evils of this commerce.

Well and forcibly did the former Chief Justice of the Supreme Court of the United States put this proposition.



In *Giozza v. Tiernan*, 148 U. S. 657, Mr. Chief Justice Fuller says, at page 61, in speaking of the constitutionality of laws regulating the sale of liquors in Texas:

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national Government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

Here we have a clear statement going to the very fundamentals in defining the limit, if any there be, to the exercise of that power residing in every State to guard against the evil of a traffic which menaces the health, the morals and the safety of the people. Of course, a State Constitution may restrict the exercise of the police power in any direction, or may express more clearly the freedom from such restrictions. But so far as a uniform rule can be stated it is to the effect that the business of dealing in intoxicants as a beverage is one having no inherent or inalienable rights; it is one for which no constitutional guaranties were written, and is to be protected only in case the legislative authority attempts in a pretended exercise of the power to regulate or prohibit it, to needlessly destroy property or arbitrarily discriminate between those against whom its power is directed.

DECISIONS FROM MANY COURTS SUSTAIN THE VIEW THAT THE CHARACTER OF THE LIQUOR TRAFFIC IS SUCH THAT IT CANNOT INVOKE THOSE CONSTITUTIONAL GUARANTIES WHICH PROTECT OTHER PERSONAL AND PROPERTY RIGHTS.

Decisions without number and from practically every jurisdiction in this country could be cited to support the general principles we contend for herein. We cite a few of the more important, going particularly to the proposition that the liquor business is peculiarly within the police power; that there is no right to engage in it which is protected by constitutional limitations; that it can not claim the inviolability of property or the equal protection of the law in the same sense that personal, political and property rights generally invoke it, and finally that there is no limit to the measures that may be devised to mitigate this evil or destroy it altogether, so long as such measures are designed to accomplish that purpose only and treat all alike who are alike engaged in the unwholesome trade.

Foster vs. Kansas, 112 U. S. 201, 28 L. Ed. 629.  
 Boston Beer Co. vs. Mass., 97 U. S. 25, 24 L. Ed. 989.  
 Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.  
 Kidd vs. Pearson, 128 U. S. 1.  
 Crowley vs. Christensen, 137 U. S. 91, 34 L. Ed. 620.  
 Goddard vs. The Town of Jacksonville, 15 Ill. 589.  
 Our House No. 2 vs. The State, 4 Freem. (Iowa).  
 172; Beebe vs. State, 6 Ind. 542.  
 State ex rel. vs. Crawford, 42 American Reports, 186.  
 Thurlow vs. Commonwealth of Mass., 5 Howard, 504.  
 State vs. Kansas, 80 Pacific, 987.  
 Crowley vs. Christensen, 137 U. S. 86.  
 Santo et al vs. State, 2 Iowa, 165-190.

## CONSTITUTION OF WEST VIRGINIA FURTHER ELUCIDATES POLICE POWER

In 1912 the people of West Virginia adopted the following amendment to their constitution:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale, and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the Legislature may prescribe. The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

In addition to the police power of the State, this amendment to the Constitution makes clear the purpose of the sovereign people of West Virginia. The manufacture, sale and keeping for sale of all liquors for beverage purposes is prohibited. The sale for medicinal, pharmaceutical, mechanical, sacramental, scientific and industrial purposes may be authorized by the Legislature. The General Assembly cannot, however, permit the beverage traffic or distribution. If the people of West Virginia are rightly prevented from selling liquor for personal use or from manufacturing it for personal use for beverage purposes, it logically follows that no one in that State has any inherent or legal right to have it sold, or manufactured for their own use as a beverage. In enforcing this provision of the Constitution, laws were passed preventing the sale, furnishing and giving away of intoxicating liquor as a beverage. All so-called soft drinks which are commonly used as a subterfuge in the distribu-

tion of liquor were prohibited; solicitation was prohibited. A law was enacted making the place of delivery the place of sale, and also to prohibit persons from receiving or having in their possession intoxicating liquors received from a common carrier. All of these laws were enacted for the sole purpose of making effective the provisions of the new constitution.

IF A STATUTE PURPORTING TO BE PASSED TO PROTECT PUBLIC HEALTH, PUBLIC MORALS, PUBLIC SAFETY, AND PUBLIC WELFARE HAS REAL AND SUBSTANTIAL RELATION TO THOSE OBJECTS, IT IS A PROPER EXERCISE OF THE POLICE POWER, AND THE COURTS HAVE BEEN LIBERAL IN SUSTAINING SUCH STATUTES.

*Mugler vs. Kansas*, 123 U. S. 623, 660, 31 L. Ed. 205, 210 8 Sup. Ct. Rep. 273; *Plumley vs. Mass.*, 155 U. S. 461, 39 L. Ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Powell vs. Penn.* 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Slaughterhouse Cases*, 16 Wall, 36, 21 L. Ed. 394.

This same rule has been followed in construing statutes under the police power prohibiting the liquor traffic. In *Lincoln v. Smith*, 27 Vt. 320, at 337, the Court said:

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

*Marks vs. State*, 155 Ala. 71.

"The evil to be remedied is the use of intoxicating liquors as a beverage \* \* \* and the object of the law under this principle must not be lost sight of in its interpretation."

See also *State vs. Delaye*, 68 Southern 995, ex parte *Crane*, 151 Pac. Rep. 1006; also *State vs. Maine*, 20 L. R. A. 496; *Purity Extract Co. vs. Lynch*, 226 U. S. 201.

## DO THE WEST VIRGINIA STATUTES HAVE A REASONABLE RELATION TO THE PUR- POSE SOUGHT TO BE ACCOMPLISHED?

Both the Constitution and the State laws prohibit the sale and distribution of intoxicating liquor, as above set forth. These laws were enacted under the Constitution and the police power of the State to protect public morals and promote the public good. The real purpose of these laws is to prevent and discourage the use of intoxicating liquor as a beverage, because it is hurtful to the individual and the community. In order to accomplish the purpose, laws had to be enacted to prevent liquor dealers from outside the State from sending the deleterious commodity into the State. Opposing counsel do not claim there is any lack of authority to prevent this distribution or use within the State, but denies that either the State or the Federal legislative power may prevent its shipment for personal use from without the borders of the State.

Congress has enacted the law to give relief so far as a Federal Government is responsible for these shipments through the agencies of interstate carriers. The state has supplemented this legislation by enacting laws authorized under the Constitution and police power of the State. The laws prohibiting possession or reception of liquor as a beverage were enacted to carry out the purpose authorized in the Constitution of West Virginia. The law making the place of delivery the place of sale has a vital relation to the end to be sought by this legislation. Mr. Blue in his brief has presented fully the reasons and authority for sustaining this provision of the law.

## RECEIPT AND POSSESSION OF LIQUOR FROM A COMMON CARRIER

The State not only has the right to prohibit certain acts, but also the right to prohibit the possession of the

instrument for accomplishing those prohibited acts, even though such instruments may be harmless in themselves. This principle was established in the case of *Patsone v. Pennsylvania*, 232 Sup. Ct. Rep., page 138.

In this the purpose of the statute was to protect game for food supply. The law was sustained which prevented unnaturalized citizens from shooting such game or having in their possession certain firearms by means of which they might shoot such game.

The Court said in discussing this question:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." *Lindsley vs. National Carbonic Gas Co.*, 220 U. S. 61, 80, 81, 55 L. Ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C. 160. The State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." *Central Lumber Co. vs. South Dakota*, 226 U. S. 157, 160, 57 L. Ed. 164, 169, 33 Sup. Ct. Rep. 66; *Rosenthal vs. New York*, 226 U. S. 260, 270, 57 L. Ed. 212, 216, 33 Sup. Ct. Rep. 27; *L'Hote vs. New Orleans*, 177 U. S. 587, 44 L. Ed. 899, 20 Sup. Ct. Rep. 788. See further *Louisville & N. R. Co. vs. Melton*, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676. "The question, therefore, narrows itself to whether this Court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." Bar-

rett vs. Indiana, 229 U. S. 26, 29, 57 L. Ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

"Obviously the question, so stated, is one of local experience, on which this Court ought to be very slow to declare that the State Legislature was wrong in its facts."

It is manifest that the means for accomplishing the purpose of a constitutional amendment must be construed with a great deal of latitude, and the body which is best equipped to determine how far the State should go, is the Legislature itself. The chief obstacle in the enforcement of law in a prohibition State is the common carrier. Through the means of such common carrier attempt is made to furnish liquor to the people, just as was formerly done through the saloon. If this is permitted and as much liquor should be consumed by the people, then there would be little or no advantage in the passage of the prohibition laws.

In order to prevent this agency of distribution, the Legislature decided that the most effective means was to prevent the possession or receipt of liquor from a common carrier. All carriers are treated alike, both inter and intra-state carriers.

This statute not only has a reasonable relation to the purpose to be accomplished, but is a necessary aid in the reasonable enforcement of the law. If any person is permitted to receive the liquor and possess it from a common carrier, it forms an unnecessary burden upon the officer of the law to watch the individual until an overt act of lawlessness is committed. To make law enforcement hard is not the function of government or the proper construction to be placed upon statutes intended for the public good.

We have already established in another part of this brief that no individual has any constitutional right to possess liquor for beverage purposes. If he has no right to possess liquor for this purpose, it then follows that the Legislature may prohibit him from receiving such liquor



from any agency which may be used as an easy means to accomplish the violation of the law.

If a foreigner may be prevented from having a shotgun because it is a means by which he would kill game, certainly the act in question in this statute may be prohibited without even approximating the length to which this Court went in upholding the Pennsylvania statute.

The power now residing in the State is clearly set forth in the case of *Southern Express Company vs. Whittle*, *Southern Reporter* 652:

The Webb-Kenyon law "prohibits the shipment or transportation of liquor from one State into another, not only when it is intended to be sold in violation of any law of such State, but when it is to be received or possessed, or in any manner used in violation of the State law."—*State of West Virginia vs. Adams Express Co.*, *supra*. "There is nothing in the Webb-Kenyon law to indicate any intention to restrict its beneficent and considerate effect to only those cases where total prohibition, with respect to the sale, receipt or possession of intoxicating liquors, is the statutory status in a State. The dominant idea in the law is to deny the privilege and protection of lawful interstate commerce to the instrument of intended violation of any valid State law affecting the use, possession, receipt, etc., of intoxicating liquors. The plain terms of the statute inhibit any right to enter intoxicants in interstate commerce where the purpose is unlawful."

The State is now free to exercise its police power to the extent of prohibiting either the possession, or receipt, of intoxicating liquors. These are the incidents leading to its use which will produce the evil sought to be remedied.

The Supreme Court of Idaho in discussing this point said with reference to the statute in that State: 151 *Pac. Rep.* 1006;

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for

scientific or medicinal purposes, or for compounding or preparing medicines so that the possession of whisky or any intoxicating liquor other than wine and pure alcohol for the uses above mentioned, is prohibited."

The Court further said:

"Does the statute purport to have been enacted to protect the public health and public morals and public safety? Has it a real and substantial relation to those objects, or is it on the other hand a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation, address themselves to the legislative and judicial branch of the government. \* \* \*

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power, and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession;' and since that great difficulty has been encountered in enforcing the prohibitory laws the statement made by the learned jurist in the case of *Mugler vs. Kansas*, supra, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage might well be said with respect to its possession, which would make it read:

"'And so if, in the judgment of the Legislature the manufacture of intoxicating liquors \* \* \* would tend to cripple, if not defeat, the effort to guard the community against the evil attending the excessive

use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question."

The Court reasons directly to the point in showing what the purpose of this legislation is and then concluding that the statutes in question were intended to help aid in the execution of those statutes.

# A STATE HAS A RIGHT TO CLASSIFY SUBJECTS FOR THE PURPOSE OF EXERCISING THE POLICE POWER.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; Magoun v. Ill. Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357; Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22, 25, L. Ed. 989; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 141, 107 S. W. 710; St. Louis I. M. & S. R. Co. v. State, 86 Ark. 518, 112 S. W. 150; Badenoch v. Chicago, 222 Ill. 71, 78, N. E. 31; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L. R. A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Com. v. Hana, 195 Mass. 262, 11 L. R. A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Slaughter-house Cases, 16 Wall. 36, 21 L. Ed. 394; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 236, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; McCready v. Va. 94 U. S. 391, 24 L. Ed. 248.

Classification may be properly based upon the "degree of evil" designed to be remedied.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. Ed. 236, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 686, 57 L. Ed. 1022, 1024, 33 Sup. Ct. Rep. 715.

In the exercise of the police power there is no limitation on the classification of objects affected so long as there is no arbitrary or unreasonable classification.

As Justice Fuller said in the case of *Giozza vs. Tierman*, 148 U. S. 657:

"The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

#### THE WEST VIRGINIA STATUTES PROVIDE REASONABLE CLASSIFICATION IN THEIR PROHIBITION.

The laws of West Virginia relating to the shipment of liquor into the State deal with agencies which are in a class by themselves. The man who attempts to manufacture liquor in the State is penalized by the laws prohibiting the manufacture for beverage purposes. If he purchases the liquor from an illegal manufacturer and attempts to distribute it, the law prevents this.

The one great source of distribution of liquor came through the common carrier and it is a natural classification to prohibit the receipt or possession of intoxicating liquor from this agency.

One of the objections raised to this kind of legislation is stated in *Freund on Police Power*, section 738, "Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted." The statement of this objection makes clearer than ever the reasonableness of the legislation in question. The special danger confronted in West Virginia was the shipment

of liquor through the channels of commerce. The State could only prohibit acts within her jurisdiction. The sale, furnishing and manufacture of liquor was prohibited. The next step for the State was to prohibit the possession and receipt of liquor from these agencies which aided law-breaking from without the borders of the State.

The receipt and possession of liquor from other agencies than common carriers are taken care of by other laws. The laws in question are simply part of a system of legislation intended to prevent and discourage the sale, furnishing and use of intoxicating liquor as a beverage.

TRANSACTIONS ACCESSORY OR INCIDENTAL TO  
BRINGING LIQUORS INTO THE STATE AND  
THE DISPOSITION OF THEM MAY BE  
PROHIBITED.

The proposition is well settled that any transaction which is incidental to an unlawful business may be prohibited. This is not only another phase of the principle applied by this Court in the case of the Purity Extract Co. vs. Lynch, *supra*, where it was held that an innocent act may be prohibited, if it is necessary, in preventing an evil which may be properly inhibited. That such incidental transaction may be prohibited was settled in the case of Delameter vs. South Dakota, 10 Am. Eng. Anno. 733.

Before the passage of the Webb-Kenyon law this case was sustained under a statute which prohibited the soliciting of orders for liquor even though the place where the order was filled and completed was outside the State. The Court sustained the law on the theory that the transaction was accessory or incidental to the business of bringing liquors into the State and disposing of them in violation of the State law.

Unless such a rule is followed in construing and sustaining State laws, those who desire to violate law would receive great encouragement. As a rule Courts have recog-

nized this fact and have sustained statutes which prevented these transactions, which are incidental to the unlawful acts. In doing this some innocent acts may be included, but this inconvenience cannot be used as a valid objection to a statute which was intended to promote the public good and to help in the enforcement of law for that end.

The Supreme Court of North Carolina in the recent case of Glenn vs. Southern Express Co., states this proposition as follows:

"The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced to sell and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of evasion of the prohibition law that restrictions upon the arrival or delivery in the State are necessary to prevent illicit sales."

This is a concise statement of the facts which the officers of the law face in Prohibition territory. Wherever any means are provided for the introduction of liquor for purposes which result in little harm, this very means is used by the liquor interests to break down the main purpose of the law. Consequently, the States have been compelled to prohibit these acts which represent the lesser evil in order to prevent the greater. In practically every instance those who complain about these statutes are the ones who are responsible by their lawlessness for their enactment. If the liquor interests from outside the State of West Virginia had respected the sovereign will of the people of that State, many of these laws probably would never have been enacted. It became necessary in order to carry out the policy of the State and to secure a reasonable enforcement of the organic and statute law, to enact these provisions—making the place of delivery the place of sale, and prohibiting receipt and possession of liquor from common carriers.

## LEGISLATIVE POLICY OF WEST VIRGINIA SUSTAINED BY ITS SUPREME COURT.

When this case was before this Court on the original hearing, it was claimed that the Supreme Court of West Virginia would not sustain the statutes in question. Since the former hearing the Supreme Court of West Virginia has modified, and virtually reversed the decision in the Gilman case, or at least the construction placed upon that decision by opposing counsel. This has been referred to in a former part of this brief.

In the two decisions recently handed down by the Supreme Court of West Virginia, the position of that Court is made clear. The first case was entitled *State vs. Davis*, No. 2864, which involved the law which prohibits soliciting or receiving orders for liquor, which is section 3 of the Yost law, and section 8, which makes it unlawful to advertise such liquors for sale. The Court, after citing the case of *Delameter vs. South Dakota*, 10 Am. & Eng. Anno. 733; *Hooper vs. California*, 155 U. S. 648; *Williams vs. Fears*, 179 U. S. 270; *Rearick vs. Pennsylvania*, 203 U. S. 507, said:

"But in the face of these federal decisions how are these provisions of the statute to be applied to interstate business, or to transactions originating outside of the State? It is insisted, of course, that they fall at once under the protecting aegis of the Wilson Act, or if not so, that they come under the protection of the Webb-Kenyon law. The case of *Delameter v. South Dakota*, supra, is a direct decision that a local statute regulatory of the business of soliciting orders for liquor located in another State is valid when applied to one personally present in this State and engaged in the inhibited business. This upon the ground that such transaction is accessory or incidental to the business of bringing liquors into the state and there selling or otherwise disposing of them in violation of the local statute, and that any other construction of the Wilson Act would at least violate the spirit of that statute, and render the state



helpless in the enforcement of its local statutes intended to be protected by that act." \* \* \*

"The Delameter case is not a direct decision on the specific point involved in this case. But anti-advertising liquor laws, like the one involved here, generally, have been held valid when applied to interstate transactions. *State v. Delaye* (Ala.), 68 So. 993. Defendant was not personally or by agent in the State doing the things inhibited by statute; he made use of the United States mails to accomplish his purposes, and to do what, if present personally or by agent, he could not lawfully have accomplished." \* \* In *R. M. Rose Co. v. State*, 133 Ga., 353 65, S. E. 770, 36 L. R. A. (N.S.), 443, reversing the judgment of the lower court, it was distinctly decided that an indictment charging defendant with use of the mails in soliciting orders by means of advertising literature substantially as shown in this case constituted no offense under the penal code of that State. But as suggested in the note to this case, as reported in the 36 L. R. A. *supra*, while the Delameter case may not be a direct decision on the powers of the State to regulate or prohibit the business of advertising or soliciting orders in the manner attempted in the Yost Law, that case nevertheless destroys any affirmative support against the existence of that power which might otherwise be derived from the earlier cases referred to.

"It must be conceded that soliciting orders by means of advertisements, if resulting in a sale of liquors located outside of the State, although incidental thereto, would constitute a part of such sale, and that if prior to the Wilson Act, such soliciting would have been protected as interstate commerce, for unless a part of such commerce, how could such personal solicitation and receipt of orders for liquors, prior to that act, have been brought under the protection of the Federal Constitution and protected thereby? Whether solicited by personal presence in the State, or by the use of the United States mails, the effect of the transaction with respect to the local statute would necessarily be the same.

"Did the use of the mails by defendant in the manner shown constitute an offense under our statute? Federal protection to the liquor traffic having

been withdrawn by the Wilson Act and the Webb-Kenyon Act, we think our statute covers the case presented by the pleadings and proof in this case. Use of the mails is not prohibited by the statute, but the business of soliciting orders by means of circulars, etc., is prohibited. It seems but a short step from the act of being personally present and soliciting orders or distributing advertisements to the doing of the same thing by the agency of the United States mails. We do not think a good ground of distinction can be suggested. Of course the object to be accomplished could not be attained except by delivery of the matter to prospective customers, but this end could as well be reached by the use of the mails as by the physical presence of the absent dealer in the State. \* \* \*

"As interpreted in the Delameter case, the Wilson act removed all Federal restraint upon the States in regulating the soliciting of orders for liquor to be imported and delivered to the consignee in violation of local statutes. And as applied to actual shipments of liquor, the Supreme Court in *Rhodes v. State of Iowa*, 179 U. S. 412, and in *Re Rahrer*, 140 U. S. 545, decided that the word 'arrival,' employed in the Wilson Act, meant actual delivery of the liquor to the consignee, and that until then the State statute could not become operative upon an interstate shipment. Chief Justice Clark, in his concurring opinion in *State v. Cardwell* (N. C.), 81 S. E. 628, 630, referring to the cases just cited, says: 'In this latter case, however, Chief Justice Fuller, speaking for the Court, says: 'No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.' Upon this hint, Congress acted by passing the Webb-Kenyon law which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon delivery to the carrier. In the same case Chief Justice Fuller further says: 'Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported

packages in their original condition, created by the absence of a specific utterance on its part.' Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that statute to intoxicating liquor 'which is intended by any one interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of this State.'

"We think Judge Clark's interpretation of the Webb-Kenyon Act, though thought by the majority not to be involved in that case, has substantial foundation in the history of the Federal legislation referred to. The Webb-Kenyon Act, in terms, is limited to the shipment or transportation of intoxicating liquors, and to liquors intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of the State statute. \* \* \*

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offence of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the State by a common carrier would be in furtherance of the unlawful purposes of those violating the statute.

"Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the State, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

"So we conclude, in view of the interpretation of the Wilson Act, that this latest Federal statute supplementing that act has so far removed restrictions upon State action as to validate the provisions of the Yost Law in question, and that the defendant is guilty as charged."

The Supreme Court of West Virginia further expressed its views with reference to these statutes in the case of *State vs. Sixo*, No. 2895. This case involved a violation of Section 31 of the West Virginia statutes which provided, that:

"It shall be unlawful for any person to bring or carry into the State, or from one place to another within the State, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed, or written on the side or top of the suit case, trunk or other container in large, display letters in the English language, the contents of the container or containers and the quantity and kind of the liquors contained therein."

In sustaining the validity of this statute the Court said:

"But it is insisted by counsel for plaintiff in error that said section 31 of chapter 7, of the acts of the Legislature of 1915, is unconstitutional and void. Counsel argues at great length to prove that the Legislature could pass no valid act making it an offense for a person to have in his possession liquors, unless for some improper purposes. \* \* \*

"The case of *State v. Gilman*, supra, is authority for the proposition that a statute prohibiting the keeping of liquors by one person for another, without a State license therefor, is unconstitutional and void, under the Constitution then in force; but it does not follow that the Legislature in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be brought into the State or carried from one place to another within the State.

"Since the case of *State v. Gilman* was decided, the Constitution of the State has been amended. The Constitution as amended prohibits the manufacture and keeping for sale of malt, vinous and spirituous liquors, etc., and requires the Legislature to 'enact such laws with regulations, conditions, securities and as may be necessary to carry into effect the provisions of this section.'

"This amendment became effective July 1, 1914.

"It is the duty of the Legislature to enact such laws as may be necessary to make effective this provision of the Constitution as amended. The Legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the State, or carried from one place to another within the State, in quantities of one-half gallon or

more, to be marked or labeled. Whether or not this is a wise policy is not for the Courts to determine. If the Legislature has not exceeded its powers, the Courts cannot interfere. The Courts may decide whether or not the Legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; this would be to subordinate the will of the Legislature to the opinion of the Courts."

"In a well considered case of Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, Mr. Justice Hughes wrote a very able opinion and said:

"It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, that it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

"We are clearly of the opinion that the portion of said section 31, now under consideration, is within the legislative power."

It is manifest from these decisions that the Supreme Court of West Virginia upholds the doctrine in construing their own constitution as set forth in the Purity Extract Co. vs. Lynch case. Under this far-reaching and wise decision, even innocent acts may be prohibited when they are used as aids to the violation of laws enacted under the police power. It is certainly manifest to any public officer, who has had any experience in enforcing laws against the liquor traffic, that the statutes in question are necessary in order to have a reasonable enforcement of the prohibition laws of West Virginia.

If a liquor dealer from Baltimore, Cincinnati or Louisville, Ky., can reach over into West Virginia and by an express company, or railroad, distribute liquors in this way, a great benefit to be attained by the prohibitory law will be destroyed. As has been repeatedly held by the many State

Supreme Courts, the purpose of all these laws is to discourage and prevent the use of liquor. If as much liquor is to be used in a State after prohibition as before, it will then be admitted that the purpose of the law is a failure. We do not believe that any such construction is made necessary by the provisions of either the State or Federal Constitution.

The Supreme Court of West Virginia also enunciates the doctrine that any transaction which is accessory, or incidental to the bringing of liquors into the State to be disposed of in violation of law, may be prohibited. This doctrine, also, is sufficient to sustain the laws in question. If liquor may be delivered into West Virginia and the State cannot prevent any person from having it or possessing it, the enforcement of the statute is made unreasonable and difficult and the law-breaking liquor interests would be encouraged to increase their efforts in breaking down the remaining statutes intended to curb this well-recognized evil. The receiving of the liquor and the possessing it and delivering it into the State are all incidents to the acts which the State has legally prohibited. As has been said repeatedly by the Courts of last resort in cases cited, it is not the sale of liquor that injures the purchaser; it is not the possession of it primarily that injures the purchaser, **but the use of the liquor**, and all of these acts, the sale, possession and receipt, are but a means of placing the liquor where it will do harm. Consequently, the same reasoning which sustains the law prohibiting the sale of liquor should sustain the law which prohibits the receipt, or possession of the liquor.

The length to which the State will go in prohibiting these means which encourage the use, is a matter for legislative discretion. In the evolution of the race and the development of a higher civilization, these steps will be taken in response to growing public sentiment upon this question.

To deny the State the right to enact such laws would thwart the fundamental purpose of our government to pro-

mote the general welfare and safeguard public morals and the public good. The Supreme Court of West Virginia has laid down the principles by which it will be guided in construing these laws and we do not believe that this Court can justly interfere with these decisions, so clearly intended to aid the enforcement of law and promote the public welfare.

Statutes, which help to make men sober and patriotic, which result in reducing crime and degeneracy and which make possible the enforcement of law, must be valid, if our form of government is to endure.

We respectfully submit that the decree of the lower Courts should be sustained.

W. B. WHEELER,  
Of Counsel for the State of West Virginia.



# INDEX

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Page.

## ANSWER TO APPELLANT'S FIRST ASSIGNMENT.

Shipment into the state of intoxicating liquors, forbidden by the statute, is an unlawful sale in the county wherein the carrier makes delivery .....	2
---	---

## FIRST—ARGUMENT ON FIRST ASSIGNMENT.

Prohibition Amendment ratified 1912 .....	2
Sections 1-4 Yost law .....	3-6
Analysis Amendment 1912 .....	6
Spirit Constitutional Amendment, and Laws Enacted pursuant thereto .....	8
Place delivery place sale .....	15
Legislature had in mind interstate shipments..	26
Legislature had in mind personal use .....	29

## SECOND—SECOND ASSIGNMENT OF ERROR.

Yost Law prohibits non-resident soliciting orders for intoxicating liquors .....	31
Soliciting through agency of mail same as in person .....	31
Construed by West Virginia court .....	39

## THIRD—CARRIER CAN BE PUBLIC NUISANCE .....

## FOURTH—SUBSEQUENT LEGISLATION .....

Amended section 7, Acts 1915 .....	43
Section 34 Extraordinary Session 1915 .....	44
Court will not do a vain thing .....	45
Amendment constitutional .....	46

## FIFTH—WEBB-KENYON LAW.

Yost law not in contravention commerce clause Federal constitution of Fifth and Fourteenth Amendments .....	53
Webb-Kenyon Law constitutional .....	53
State laws constitutional .....	55

## SIXTH—CONCLUSION .....

58

# Index of Cases, Etc.

	Page.
Amendment Constitution 1912.....	2, 3, 6, 7
Advertiser Co. v. State, Ala. 69 So., 501.....	38, 39
Atkinson v. Southern Ex. Co., 94 S. C., 444.....	20
Brown v. Meredith, 12 Wheaton, 420.....	15
Campbell v. California 200 U. S., 87.....	45
Crowley v. Christensen 137 U. S., 86.....	8, 9, 58
Delamater v. S. D., 205 U. S., 93.....	26, 32, 54
Ex parte Crane, 151 Pac., 1006.....	13
Eberle v. Michigan, 232 U. S., 700.....	10
Glenn v. Southern Ex. Co., N. C. 87 S. E., 136....	26, 27, 51, 52, 58
Hayner v. State, 83 Ohio St., 178.....	33, 34
Mills v. Green, 159 U. S., 651.....	45
Mugler v. Kansas, 123 U. S., 623.....	9, 59
Palliser In re, 136 U. S., 257.....	36
Prohibition Law of West Virginia.....	3, 4, 5, 6, 15, 31, 32, 40, 41, 42, 43, 44
Purity Extract Co. v. Lynch, 226 U. S., 192.....	28
Rose v. State, Ga. 62 S. E., 117.....	34
Rose v. State, Ga. 65 S. E., 770.....	34
State v. Adams Express Co., W. Va. 219 Fed., 794 . . . .	11, 16, 17, 18, 19, 20, 38, 41, 54, 57, 60
State v. Cardwell, N. C. 81 S. E., 630.....	20, 21, 22, 23, 49, 57
State v. Davis, W. Va. 87 S. E., 262.....	24, 25, 28, 29, 30, 39, 42, 48, 49, 58
State v. Sixo W. Va. 87 S. E., 269.....	7, 46, 47, 48, 49
State of Pa. v. W. B. B. Co., 18 How., 421.....	45
State v. Patterson, N. C. 47 S. E., 808.....	24
State v. Phillips, Miss. 67 So., 651.....	13, 14
State v. U. S. Exp. Co., Ia. 145 N. W., 451.....	41, 57, 58
State v. Morrow, S. C. 18 S. E., 853.....	37
Southern Ex. Co. v. Bell, Ala. 69 So., 652.....	26
Southern Ex. Co. v. Whittle, 69 So., 652 .....	11, 49, 50, 58
U. S. v. Thayer, 209 U. S., 39.....	33, 35, 36
U. S. v. Schooner Peggy, 1 Cranch 37.....	45
Zinn v. State, Ark. 114 S. W., 227.....	33

No. 384.

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SUPREME COURT OF THE UNITED STATES

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October Term 1915

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THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,*

*vs.*

THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA,  
*Appellees.*

---

Appeal from the District Court of the United States for the  
District of Maryland.

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UPON RE-ARGUMENT.

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**BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.**

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Appellant's assignments of error appear at pages 54 and 55 of the record. We do not now have brief of counsel for appellant on re-argument. We assume, however, that the assignments of error relied upon by appellant on re-hearing will be the same as those relied upon at the former submission. The assignments of error then relied upon appear at pages 12 and 13 of brief formerly filed

on behalf of appellant. The first error so assigned and relied upon by counsel for appellant is stated as follows, viz:

“ In construing the law of West Virginia as undertaking to make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from another state and delivered to the consignee in West Virginia for his personal use, in pursuance of a sale made by the shipper to the consignee in such other state.”

Our answer to such assignment, in condensed form, is stated as follows, viz:

Under the laws of West Virginia, in case of a sale in which a shipment or delivery of intoxicating liquors is made by a common or other carrier, the sale of such liquors shall be deemed to be made in the county in said state wherein delivery of such intoxicating liquors is made to the consignee by such common or other carrier; although the shipment might have been made by a dealer residing out of the state, upon an order received by him to be filled at his place of business, for shipment and delivery by the carrier to the consignee in West Virginia, for the personal use of the consignee.

### **FIRST.**

#### **Argument on First Assignment.**

At the general election held in West Virginia in the year 1912 an amendment to the constitution of said state was ratified by the people thereof in the following words and figures:

“On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby

prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

On the 11th day of February, 1913, the legislature of appellee state enacted chapter 13, Acts 1913, the State Prohibition Law, generally known in the state, and hereinafter referred to in this brief, as the Yost law. Said amendment and law became effective on the first day of July, 1914. Sections 1, 2, 3 and 4 of the Yost law, (or so much thereof as seem to be pertinent to the assignment of error now under discussion) are now here set forth, as follows:

"Sec. 1. The word 'liquors' as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquors, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word 'liquors', as hereinafter used in this act.

"Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors manufactured prior to July first, one

thousand nine hundred and fourteen, and stored in United States bonded warehouses in the custody of the United States collector of internal revenue, and the said liquors when tax paid and in transit from such warehouse to points outside of this state.

“Sec. 3. Except as hereinafter provided, if any person acting for himself or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the de-

livery thereof is made by such carrier to the consignee, his agent or employee. \* \* \*

"Sec. 4. The provisions of this act shall not be construed to prevent any one from manufacturing for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal and scientific purposes, or of wine for sacramental purposes, by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. \* \* \*

"It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person not a minor and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a



record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit, and only in the county where the same is made and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath. \* \* \*

#### Analysis of the Amendment of 1912.

The amendment of 1912, for analytical purposes, may be divided into three parts, as follows:

(1) "On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state."

We shall later endeavor to show the spirit and purpose and true interpretation of this part of the amendment.

(2) "Provided, however, that the manufacture, and sale, and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe."

It will be observed that this provision is permissive, not mandatory upon the legislature. It does operate, however, under the rules of construction—*expressio unius est exclusio alterius*—to deprive the legislature of the power to enact any law that will permit the manufacture, sale or keeping or storing for sale of intoxicating liquors as beverages, even for personal use. By the very terms of

this part of the amendment the legislature is only permitted to enact laws for the manufacture, sale and keeping for sale of intoxicating liquors for *medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and then only under such regulations as the legislature may prescribe.*

(3) "The legislature shall, without delay enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

This part of the emendment is *mandatory*—not directory—upon the legislature. And laws enacted pursuant to this mandate of the constitution, when not violative of rights guaranteed under state and federal constitutions, are wholly within the province of the legislature. In other words, the legislature must enact the necessary laws to make effective the amendment-laws that will accomplish the purpose and intent of the amendment. The Supreme Court of Appeals of West Virginia, in *State v. Sixo*, (decided Nov. 30, 1915), 87 S. E., 267, at page 269, said:

"It is the duty of the legislature to enact such laws as may be necessary to make effective this provision of the constitution as amended. \* \* \* If the legislature has not exceeded its powers the courts cannot interfere. The courts may decide whether or not the legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; as this would be to subordinate the will of the legislature to the opinion of the courts. \* \* In a well considered case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S., 192, 33 Sup. Ct. 44, 57 L. Ed. 184, Mr. Justice Hughes wrote a very able opinion and said: 'It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures hav-

ing reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transtaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.' "

**The Spirit of the Constitutional Amendment and Laws Enacted Pursuant Thereto.**

It is submitted that in construing and interpreting the constitutional amendment of 1912 and the laws enacted pursuant thereto, it is necessary to consider the spirit—the very intent and purpose—of the amendment. *The people of appellee state by adoption of the amendment to the state constitution meant to discourage and prevent the consumption of alcoholic liquors as beverages on the part of her citizens and residents within her jurisdiction.* To otherwise state the intent and purpose of such amendment would be absurd and unreasonable. The amendment and laws enacted pursuant thereto express that the public policy of appellee state is the discouragement and prevention of the consumption of alcoholic beverages by her citizens. Such public policy is based upon the well recognized evil of consumption of intoxicating liquors as beverages. This well recognized evil of individual consumption of intoxicating liquors has been fully recognized and expressed by this court. It is no answer to this proposition to say that "What a man shall drink is not properly matter for legislation."

In

Crowley v. Christensen, 137 U. S., 86, Mr. Justice Field, speaking for the court, page 90, said:

"It is urged that, as the liquors are used as a beverage, an injury following them, if taken in excess, is voluntarily inflicted, and is confined to the

party offending, their sales should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependant upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as a proper subject of legislative regulation. \* \* \*

"There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils."

In

*Mugler v. Kansas*, 123 U. S., 623, beginning at page 658, Mr. Justice Harlan, speaking for the court, said:

"Chief Justice Taney said 'If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it

from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.'

\* \* \* \* Mr. Justice Grier, in still more emphatic language, said: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime—Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of public peace, health and morals must come within this category—It is not necessary for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' \* \* \* \* There is no justification (662) for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."

In *Eberle v. Mich.*, 232, U. S., 700, it was held by the court that liquor laws are enacted to protect the health, morals and welfare of the public and that even though such laws depreciate the value of property used in the

manufacture of liquor, that such depreciation is not the taking of property without due process of law as prohibited by the Fourteenth Amendment.

In

*West Virginia v. Adams Express Co.*, (C. C. A.) 219 Fed. 794, the court said, page 796:

"In trying to comprehend the legislative purpose in prohibition statutes, it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against sales. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders such as deliveries by common carriers which tend to defeat or weaken its public policy of preventing the consumption of liquors as a beverage."

In

*Southern Express Co. v. Whittle* (Ala.) 69 Sou. Rep., 652 the court (page 656) said:

"The power of the state to prohibit the manufacture or sale of intoxicants is never now questioned. It is generally accepted and finally established. The object and purpose of all our laws governing the subject of intoxicating liquors is 'to promote temperance and prevent drunkenness.

\* \* \* The evil to be remedied is the use of intoxicating liquors as a beverage. \* \* \* ' *Carl's Case*, 87 Ala., 17, 6 South. 118, 4 L. R. A. 380; *Marks v. State*, 159 Ala., 71, 84, 85, 48 South. 864,

133 Am. St. Rep. 20. Freund, in his work on the Police Power, at section 204, thus amplifies the idea expressed in our cases above quoted;

'It is certainly the more conservative view to look upon the control of the liquor traffic as a means of protecting the community from crime and the financial burdens of pauperism; but it is **also clear that the police power, resting upon this incontestable ground, is turned into a power to protect the weak individual from his own weakness, into a power to prevent the wasteful expenditure of money and time, and finally into a power to impose upon the minority the sentiments or prejudices of the majority of the community, as to what is morally right and good.'**

"See *Crowley v. Christensen*, 137 U. S., 86, 90, 91, 11 Sup. Ct. 13, 34 L. Ed. 620.

"The government does not interfere with or impair 'any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. \* \* \* Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.' *Mugler v. Kansas*, 123 U. S., 623, 662, 663, 8 Sup. Ct. 273, 298 (31 L. Ed. 205). Neither the fourteenth amendment, nor any other, 'was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. \* \* \*'" *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. All personal and related rights and privileges, whether arising out of contracts or out of or pertaining to property, are subject to the lawfully exercised police power of the state, directed to the protection of the public health, the public



morals, and the public safety. *N. O. Gas Co. v La. Light Co.*, 115 U. S., 650, 672, 6 Sup. Ct. 252, 29 L. Ed. 516; *Mugler v. Kansas*, 123 U. S. 623, 665, 666, 8 Sup. Ct. 273, 31 L. Ed. 205."

And in the same case, the court also said:

"The evil to be remedied is the use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet or for culinary purposes and the object of the law in this particular instance must not be lost sight of in its interpretation."

*Ex Parte Crane* (Idaho) 151 Pac., 1006, the court said, page 1010:

"Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals, or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity no one can drink that which he has not in his possession.' "

In

*State vs. Phillips*, (Miss.) 67 Sou. Rep., 651, the court said:

"If the object of the prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize

all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is bridged step by step, and when the preponderate and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

We submit that it would be a vain thing, an absurd thing, for the sovereign state of West Virginia to prohibit by her constitution and statutes the manufacture and sale of intoxicating liquors within her limits unless the purpose thereof is to discourage and prevent consumption of such liquors as beverages by her citizens. If consumption of such liquors as beverages is *not* to be discouraged and prevented, why prohibit the manufacture and sale of such liquors? And, is it not better and more practical to prohibit, in express terms, the manufacture and sale, rather than, in express terms, to prohibit the consumption? If the purpose and intent of the prohibitory provisions are accomplished, how can there be consumption of alcoholic liquors as beverages? In contrast with this, however, how can the *consumption* of intoxicating liquors as beverages be discouraged or prevented if the manufacture and sale and keeping for sale thereof within the states limits are *permitted*? It is obvious that there is but one practical way to prevent and discourage consumption of intoxicating liquors as beverages; and that, is to go to the very root of the evil and prohibit the manufacture and sale and keeping and storing for sale of such liquors within the territorial limits of the state.

We submit, that the foregoing authorities convincingly

and fully sustain the statement as to the spirit—the purpose—of the amendment and the laws enacted pursuant thereto, and the proposition that such constitutional and statutory provisions are based upon the well recognized evil of individual consumption of intoxicating liquors.

*If a state has the right to prohibit the manufacture of intoxicating liquors for one's own use, and the right to prohibit the sale thereof to a citizen for his own use, it must also, upon the same grounds and for the same reason, have the right to prohibit the introduction into the state of such intoxicating liquors if the protection of the federal constitution be by Congress withdrawn from such shipments. It was well said by Chief Justice Marshall, in Brown v. Meredith, 12 Wheaton, 420, "There is no difference in the effect between the power to prohibit the sale of an article and the power to prohibit its introduction into the country, the one would be the necessary sequence of the other."* (Italic ours)

Relying upon the foregoing construction and interpretation of the prohibition amendment of 1912, and the statutes enacted in pursuance thereof, as the true construction and interpretation of such amendment and laws, we now come direct to the assignment or error under consideration.

#### PLACE OF DELIVERY PLACE OF SALE.

Section 3 of the Yost law, hereinbefore set out, prohibits the manufacture, sale, keeping, storing, offering or exposing for sale intoxicating liquors. Said section also provides:

"And in case of a sale in which a shipment or delivery of such liquor is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

The same question, arising under this assignment of error, arose in equity cause of State of West Virginia *vs.* Adams Express Co. Said cause was instituted in the Circuit Court of Kanawha county, removed by the defendant to the United States District Court, and heard upon appeal by the United States Circuit Court of Appeals for the Fourth Circuit, upon appeal prosecuted by the state. The reported opinion of the Circuit Court of Appeals appears in 219 Fed., 794. We cannot better state the proposition, nor can we present stronger argument in support of appellee's contention than to quote from the opinion of the Circuit Court of Appeals at pages 796, 799, 219 Fed. Rep.

"1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquors as a beverage.

"We are not concerned in this case with the question whether the state legislature or the state legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its bor-

ders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the state and deliveries by common carriers, by which liquor dealers outside of prohibition states were enabled to thwart the efforts of state governments to save the people of the state from the liquor evil, have been forbidden by state legislation made valid by the withdrawal of the protection of intrastate commerce from such shipments under the act of Congress known as the Webb-Kenyon Act.

“The amendment to the Constitution of the state of West Virginia, known as article 6, Sec. 46, ratified in November, 1912, prohibits ‘the manufacture and sale and keeping for sale’ of intoxicating liquors with exceptions not material here; and it provides that:

‘The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.’

“On February 11, 1913, the Legislature enacted a statute to take effect July 1, 1914, which in section three contained this provision:

“Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe, or any liquors compounded with absinthe, he shall be deemed guilty of a misdemeanor \* \* \*; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling,

keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe. Laws 1913, c. 13 (Code 1913, c. 32a, sec. 3 [sec. 1282] ).

"2. At the argument it seemed to be conceded that state legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the state legislative power. The power of the state to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in *Sinnot v. Davenport*, 63 U. S. (22 How.) 227, 16 L. Ed. 243, *Delamater v. South Dakota*, 205 U. S., 93, 27 Sup. Ct., 447, 51 L. Ed., 724, 10 Ann. Cas., 733, and innumerable other federal and state decisions.

'The internal commerce of a state—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government.' *Sands vs. Manistee River Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149; *Hart v. State*, 87 Miss. 171, 39 South. 523, 112 Am. St. Rep. 437.'

"This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in *State v. Herring*, 145 N. C.

418, 58 S. E. 1007, 122 Am. St. Rep., 461, and *State v. Patterson*, 134 N. C. 612, 47 S. E. 808.

"3. There is nothing in the amendment of the state Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits 'the manufacture, sale and keeping for sale' of liquors. But it does not indicate a purpose to deprive the Legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the state on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the state as a permanent state policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the Constitution as the permanent law of the state. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in *State v. Hooker*, 22 Okl. 712, 98 Pac. 964.

"4. The point is earnestly pressed that, even if it be true that under the statute in West Virginia delivery in any county of the state is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the state in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person 'who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing or exposing for



sale as the case may be', and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the state that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling." \* \* \*

"5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor."

In

*Atkinson v. Southern Express Co.*, 94 S. C. 444,

"The state may pass a statute forbidding the importation of intoxicating liquor into this territory for personal use since the passage by Congress of the Webb-Kenyon Act, which prohibits the transportation into any state of any intoxicating liquors, intended to be received, possessed, sold or in any manner used in violation of any law of such state."

In *State v. Cardwell* (N. C.) 81 S. E., 630, Chief Justice Clark wrote a concurring opinion. Chief Justice Clark's opinion, we submit, must have particular weight with the Court in determining the case at bar for the reason to be hereinafter stated. In the concurring opinion of Chief Justice Clark (81 S. E. 630) he says, in part:

"CLARK, C. J. Concurs in the result and in the opinion, but not in the obiter that if the liquor had been shipped in from Danville, Va., the defendant could not have been convicted, citing *State v. Whisenant*, 149 N. C. 515, 63 S. E. 91, and *State v. Allen*, 161 N. C. 226, 75 S. E. 1082, for the reason that those cases were written before the passage of the Webb-Kenyon law, which was enacted for the very purpose of taking away the defense, on which those decisions were based that inter-state shipments of liquor were protected from the enforcement of a state statute. Rev. Sec. 2080, makes the place of delivery of intoxicating liquors the place of sale. This act was sustained in *State v. Patterson*, 134 N. C. 612, 47 S. E. 808, which has been repeatedly cited since with approval. But in *State v. Whisenant* and *State v. Allen*, *supra*, it was held that where the liquor had been shipped in from another state the decision in *State v. Patterson*, *supra*, and Rev. Sec. 2080, would not apply. It was to cure this defect that the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699) was passed, which is entitled 'An act divesting intoxicating liquors of their interstate character in certain cases.' This act provides that the shipment of intoxicating liquors into any state or territory in which said spirituous or intoxicating liquor 'is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, \* \* \* is hereby prohibited.'

"The shipment of intoxicating liquors from another state into this state being thus deprived by act of Congress of its interstate character, it follows that when the liquor, if it came from Danville, Va., reached Reidsville, our laws applied to it as fully in every respect as if it had been shipped in from another point in this state, and the decision in *State v. Patterson* would fully apply. The Wilson Act (Act. Aug. 8, 1890, c. 728, 26 Stat. 313

[U. S. Comp. St. 1901, p. 3177] had provided that when whiskey was shipped into a state or a district in which the sale of intoxicating liquors was forbidden that it should be 'subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory.' The United States Supreme Court, however, in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, and in *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, construed the word 'arrival' in the Wilson act to mean the actual delivery of the liquor to the consignee, and hence that it was exempt till then from being subject to the state law forbidding the sale of intoxicating liquors. In this latter case, however, Chief Justice Fuller, speaking for the court, says: 'No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.' Upon this hint, Congress acted by passing the Webb-Kenyon law which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon their delivery to the carrier. In the same case Chief Justice Fuller further says: 'Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part.' Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that statute to intoxicating liquor 'which is intended by any one interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of this State.' \* \* \* \* \*

"It has been contended that Congress could not regulate an article of interstate commerce by prohibiting its shipment altogether in certain cases. But the contrary has been uniformly held and as to many articles. In *Champion v. Ames*, 188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed. 492, Justice Harlan said that lottery tickets had always been legitimate subjects of commerce, but that Congress possessed the power under the commerce clause to prohibit altogether their transportation between state and state. The opinion is clear and able, and its reasoning applies as fully to intoxicating liquors as to lottery tickets. What subjects shall thus be prohibited as articles of interstate commerce rest in the discretion of the law-making department of the government and is not subject to review by the courts.

"In *Hoke v. U. S.* 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913 E, 905, the court held that the power of Congress over interstate commerce is direct, without limitations, and far-reaching, and includes the transportation of persons as well as property, and therefore held valid the statute of June 25, 1910 (Act June 25, 1910, c. 395, 36 Stat. 825, [U. S. Comp. St. Supp. 1911, p. 1343] ) prohibiting the white slave traffic. In that case it was held that the regulative power of Congress extends to the absolute prohibition or transportation in transit both in interstate and foreign commerce, citing the lottery ticket case (188 U. S. 321, 23 Sup. Ct., 321, 47 L. Ed. 492) above referred to, the pure food case (*Egg Co. v. U. S.*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364) and other cases. This decision has been reaffirmed by that court in *Wilson v. U. S.* 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed.—, opinion by Justice Pitney, February 24, 1914. These opinions are conclusive of the power of Congress to regulate interstate shipments of intoxicating liquor into prohibition territory by prohibiting them altogether."

It will be observed Chief Justice Clark in the consensus opinion says:

"The shipment of intoxicating liquors from another state into this state being thus deprived by act of Congress of its interstate character, it follows that when the liquor, if it came from Danville, Va., reached Reidville, our laws applied to it as fully in every respect as if it had been shipped in from another point in this state, and the decision in *State v. Patterson* would fully apply."

It will be further observed that the decision in *State v. Patterson*, (N. C.) 47 S. E. 808, upheld the statute which made the place of delivery of intoxicating liquors the place of sale.

We submit that Judge Clark's interpretation of the Webb-Kenyon act, as expressed in the concurring opinion referred to, is largely controlling in the case at bar. We so submit for the reason that the Supreme Court of Appeals of West Virginia, in *State v. Davis* (decided Nov. 30, 1915) — West Va., 87 S. E. Rep. 262, (Advance sheet No. 3, Jan. 8, 1916) substantially adopts Judge Clark's interpretation of the Webb-Kenyon act. True the Supreme Court of West Virginia in the *Davis* case did not have directly under consideration the provision of section 3 of the Yost law under consideration at this point. But the Court did have under consideration section 8 of said law. The two sections are very closely related, and each has for its purpose the making effective of the amendment of 1912. *In spirit the two sections are alike and so closely related that the Court found it necessary to refer to both in passing upon one.*

In *State v. Davis*, at page 266, the Court says:

"We think Judge Clark's interpretation of the Webb-Kenyon Act, though thought by the majority not to be involved in that case, has substan-

tial foundation in the history of the federal legislation referred to. The Webb-Kenyon Act, in terms, is limited to the shipment or transportation of intoxicating liquors, and to liquors intended by any person interested therein to be received, possessed, sold or in any manner used either in the original package or otherwise, in violation of the state statute. To bring sections 3 and 8, of the Yost Law, under this federal statute, and within the principles of the Delamater and other cases the things prohibited must be found accessory to or in some way incidental to the business of transporting liquors from one state or territory to another. The Yost Law undertakes to make the place of delivery within the state the place of sale. Wherefore, regardless of the rule of the common law, an outside dealer undertaking to effect a sale within the state by the use of the United States mails, would, if the statute be valid, be making a sale within the state in violation of the statute, whether such liquors were intended for the personal use of the purchaser or not.

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offence of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the state by a common carrier would be in furtherance of the unlawful purposes of those violating the statute."

"Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the state, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

So we conclude, in view of the interpretation of the Wilson Act, that this latest federal statute supplementing that act has so far removed restrictions upon state action as to validate the provis-

ions of the Yost Law in question, and that defendant is guilty as charged."

The cases of *Southern Express Co. v. Bell*, (Ala.) 69 Sou. Rep. 652, and *Glenn v. Southern Express Co.* (N. C.) 87 S. E. Rep. 136, Advance Sheet No. 2, January 1, 1916, in principle and by analogy sustain the position contended for by the state in the assignment of error under consideration.

Appellant relies upon such cases as *Adams Express Company v. Kentucky*, 206 U. S., 129, *Vance v. Vandercock*, 170 U. S., 439, in *Re Rahrer* 140 U. S., 545, and *Rhodes v. Iowa*, 170 U. S., 412. These decisions were all announced before the enactment of the Webb-Kenyon law. We submit that the language of Mr. Justice White, in the *Delamater* case, 205 U. S., 93, particularly were the words "and Webb-Kenyon law," made addenda thereto, apropos to the cases so relied upon.

"For this reason we at once put out of view decisions of this court, which are referred to in the argument and which are noted in the margin, because they concerned only the power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

#### **Legislature Had in Mind Interstate Shipments.**

Appellant will probably contend that the legislature did not have in mind interstate shipments, when the Yost law was enacted. We submit that this contention is not tenable. The legislature did not presume that the manufacture, sale and shipment of intoxicating liquors, in intrastate business, would seriously menace the health and morals, or disturb the peace of the people, in a state wherein the manufacture and sale of such liquors were prohibited by the constitution and statutes



of the state. Those who engage in selling such liquors, in such a state, endeavor to avoid intrastate shipments by a common carrier; other and less public means and methods are resorted to by such persons engaged in such business. Again, since intoxicating liquors could neither be manufactured nor kept for sale in a state, the legislature did not presume—could not well presume—that shipments thereof would be *intra-state*. On the other hand the legislative presumption was, necessarily, that the shipments would come, and must so come, if shipments were made from without the state—*inter-state*—and the legislative purpose, therefore, was to protect the people of the state from such interstate shipments, and to give force and effect to the public policy of the state as expressed and reflected in her organic and statutory laws.

The Supreme Court of North Carolina well expressed the purpose of such legislation in *Glenn v. Express Co.*, 87 S. E. 136, (Vol. 2, January 1, 1916), beginning at the bottom of page 141 and concluding at top of page 142, by saying:

“If considered without regard to the policy of the state in favor of prohibition, we would hold it an arbitrary and unwarranted interference with the right of the carrier to transport, and with the right of the consignee to receive; but when it is understood that the statute is but a means of enforcing the state policy of prohibition there seems to be such a reasonable relation between the two as justifies upholding the statute as a reasonable regulation. The state has declared that intoxicating liquors shall not be sold or manufactured within the state, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the state for use and those introduced to sell, and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of

evasion of the prohibition law that restrictions upon the right of delivery in the state are necessary to prevent illicit sales."

In *Purity Extract Co. v. Lynch*, 226 U. S. 192, Mr. Justice Hughes, speaking for the court, said:

"It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

In *State v. Davis*, ——— West Va., ———, 87 S. E., 262, (Vol. 3, January 8, 1916) it appears that Davis, a duly licensed liquor dealer, doing business at Oakland in the state of Maryland, through the agency of the United States mails, solicited of a person residing at Clarksburg in Harrison county, West Virginia, an order for intoxicating liquors for the latter's personal use; the letter soliciting the order was deposited by Davis in the post office at Oakland, Maryland, and received by the person solicited at Clarksburg, West Virginia. The arguments made for Davis, in principle, covered most, if not all of the arguments for appellant in this case. The Supreme Court of West Virginia interpreted the provisions of the Yost law under consideration by it as applying to interstate transactions and to liquors intended for personal use, and sustained such provision as valid under both state and federal constitutions.

### Personal Use.

Appellant will probably contend that the state legislature did not intend the provisions of section 3 of the Yost law to apply to sales and shipments of intoxicating liquors, when the same are intended for personal use of the consignee. To maintain such contention would require reading into the statute a qualifying clause that is not contained in the statute.

We reiterate, in a word, what has already been said in this brief, namely, that the very purpose of the amendment of 1912, and laws enacted pursuant thereto, was to discourage and prevent the consumption of intoxicating liquors as beverages. And we further submit that such intent, such purpose of the amendment and the laws enacted pursuant thereto, has been declared by the court of last resort of appellee state. Recurring again to *State v. Davis*, supra, it will be observed that the court said:

“Wherefore, regardless of the rule of the common law, an outside dealer undertaking to effect a sale within the state by the use of the United States mails, would, if the statute be valid, be making a sale within the state in violation of the statute, *whether such liquors were intended for the personal use of the purchaser or not.*” (The italics are ours.)

It will thus be seen that the Supreme Court of appellee state has declared that the law applies to liquors brought into the state although such liquors were intended for personal use. And the court, in connection with part of the opinion just quoted, further says:

“A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offense of which defendant was found guilty, *is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors, and the carrying of such liquors*

*into the state by a common carrier would be in furtherance of the unlawful purpose of those violating the statute. Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the state, such sale will be a violation of the statute and be covered by the Webb-Kenyon statute. (The italics are ours.)*

*We submit that the court of last resort of appellee state having considered the statute interpreted by it as applicable to inter-state shipments and to intoxicating liquors when intended for personal use, although an inter-state transaction, that the meaning of the statute therefore is no longer open to question. And the court having further considered that the statute, so interpreted, violates no rights of the citizen under the state Constitution, that the Constitutionality of the statute, under the state Constitution, is no longer open to question. And the court further considered that the statute, so interpreted, violates no rights of the citizen under the Federal Constitution, nor any of the amendments thereof.*

## SECOND.

### Second Assignment of Error.

The second error assigned by counsel for appellant is stated as follows:

“In construing the constitution and law of West Virginia as prohibiting a liquor dealer in another state from advertising by letters, mailed to citizens of West Virginia, the sale of liquors in such other state, to be delivered in pursuance of such sales to consignees in West Virginia.”

In the intervening petition of appellee state it is charged that the appellant on, and since the first day of July,

1914, has, by printed or written circular letters, order blanks and price lists, solicited citizens of said state, particularly citizens residing in the Sixteenth Judicial Circuit thereof, to give appellant, the James Clark Distilling Company, orders for intoxicating liquors. That the purpose of such letters, order blanks, etc., was to procure from the citizens of said state, particularly those residing in said Sixteenth Judicial Circuit, orders for intoxicating liquors to be filled by the appellant, and that the appellant intended to accept such orders and ship such intoxicating liquors to such citizens aforesaid by the defendant, the American Express Company, R. pp. 12-13.

It is established by the admission of John Keating, president and treasurer of appellant, a witness introduced by the appellant, that the appellant, on and since the first of July, 1914, sent circulars and order blanks into West Virginia, soliciting from the citizens thereof orders for intoxicating liquors kept for sale by the appellant. R. pp. 29-31.

Our first answer to appellant's second assignment of error is this:

(1) The Yost law prohibits any person, resident or non-resident, soliciting within the state orders for intoxicating liquors. This is valid, although such orders may only contemplate a contract resulting from final acceptance in another state. Soliciting of orders is part of the sale. A sale is forbidden, so is any constituent or accessory part thereof forbidden.

Section 3 of the Yost Act, hereinbefore quoted to a large extent, expressly provides:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for any liquors or absinthe, or any drink compounded with

absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be confined." etc. First offense, a misdemeanor; second offense, a felony.

However, it may be contended for the appellant that under the Interstate Commerce clause of the Federal Constitution, the provisions of the Yost law relative to soliciting orders cannot be applied to the non-resident dealer—that the non-resident dealer is not affected by the laws of West Virginia, as to intoxicating liquors situate at his place of business, when the dealer intends to fill the order he receives, at his place of business in response to his solicitation sent from his place of business. This has always been the contention of the outside liquor dealers, and, frankly, the contention is supported by a long line of authorities; but that line of authorities is broken. The effect of that line has been modified by the Wilson Act and the Webb-Kenyon Act. Our answer is fully sustained by *Delamater v. South Dakota*, 205 U. S., 93.

Our second answer to appellant's second assignment of error is this:

(2) While there is no Federal law that forbids the use of the mails to a non-resident liquor dealer to solicit orders for intoxicating liquors or advertise the same by circular, order blanks and price list, it is, however, most respectfully submitted that,

*the soliciting of orders for intoxicating liquors can be done by letters, price lists and order blanks, the same as though the dealer solicited in person.*

True, appellant used the mails to send letters, price lists and order blanks to citizens of West Virginia. It was not contended in the court below, and it is not contended here, that such use of the mails violated the laws

of West Virginia. The legislature of West Virginia could not declare such use of the mails to be unlawful. Congress alone can say what shall not be mailable.

Let us suppose appellant delivered in person the soliciting letters. Will any one say it had not solicited in violation of the state's law? What distinction is there between personally delivering the letters and sending them by a *servant*—the postoffice—of the writer? In *U. S. vs. Thayer*, 209 U. S. 39, the Court said:

“If the writer of the letter in person had handed it to the man addressed, in the building, without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer.”

In *Zinn v. State*, (Ark.) 114, S. W., 227, it was held that a statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory through agents, circulars or newspaper advertisements is a valid exercise of the state's police power, and it was expressly held in such case that

“A statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through circulars, is not unconstitutional as infringing the power of Congress, under U. S. Const., Art. 1, Sec. 8, to establish postoffices and designate what shall be excluded from the mails.”

In *Hayner v. State*, 83 Ohio St. Rep., 178, it was expressly held that a solicitation for intoxicating liquors may be made by letter as well as in person. Hayner was indicted and convicted for soliciting orders for intoxicating liquors. It was shown that he solicited the order by letter sent through the United States mails. The conviction was upheld by the court of last resort of Ohio, the Court holding that the Hayner letter, while mail-



able, so far as the laws governing the mails were concerned, was a solicitation

*same as though he had solicited in person,* and that a statute, making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through agents, circulars, posters, letters, etc., is not unconstitutional as infringing the powers of Congress relating to what shall be excluded from the mails.

In *Rose v. State*, (Ga.) 62 S. E., 117, the Intermediate Court furnishes a very able discussion of the proposition here involved. True, the Georgia Supreme Court, 133 Ga. 353, 65 S. E., 770, 36 L. R. A. (N. S.) 443, reversed the Intermediate Appeal Court. The opinion of the Georgia Supreme Court was handed down October 1, 1909, before enactment of the Webb-Kenyon Act. The reasoning of the Georgia Supreme Court, for the reversal, in substance, was, that the Tennessee dealer, under the Interstate Commerce clause, engaged in selling intoxicating liquors, was handling an article that was legitimate interstate commerce, not subject to any restriction by the state. The Court, in the opinion, said:

“To hold that a person had a right to make an interstate sale, but that the state to which the liquor was to be sent could prohibit him from using the interstate mails for the purpose, would certainly greatly curtail the right to do such business.”

It is apparent from the opinion of the Georgia Supreme Court that it reversed the Intermediate Appellate Court upon the ground that intoxicating liquors were unqualifiedly legitimate interstate commerce. Since the enactment of the Webb-Kenyon Act such is no longer true. Now, intoxicating liquors are divested of their interstate character when the shipment or transportation thereof into a state, to be there received, possessed,

sold or in any manner used by any person interested therein, is in violation of the law of the state.

A very clear and, we submit, determinative ruling of the Supreme Court of the United States, is found in

U. S. v. Thayer, *supra*.

Thayer, by letter, solicited funds for campaign purposes in violation of the Civil Service Act. The Court held that the solicitation was not complete until the letter was delivered to the person from whom the contribution was solicited. Such, in principle, is the proposition we are urging here. It was no offense for plaintiff to deposit its letters in the mails. It was no solicitation of the citizens of West Virginia to buy liquors from appellant until its letters were delivered to the person from whom the orders were solicited. The postoffice then had nothing more to do with the letters. The postoffice was a mere, innocent, inanimate agency that carried the soliciting letters. So long as the letters remained in the custody of the postal authorities, there were no solicitations—no offenses committed by appellant. The offense arose after the letters were delivered by the postal authorities and in the hands of the persons solicited to give orders or in the hands of such persons as advertisements of appellant's business.

Mr. Justice Holmes, speaking for the Court, in the Thayer case, pp. 42-3, said:

“Of course it is possible to solicit by letter as well as in person. It is equally clear that the person who writes the letter and intentionally puts it in the way of delivery solicits, whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way. It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. \* \* \* If the writer of the letter in person had handed it to the man address-

ed, in the building without a word and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer.

"The solicitation was made at some time, some where. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation."

Of like holding is the case of

In *Re Palliser*, 136 U. S., 257.

It is no answer to say that in the *Thayer* case it was an offense anywhere in the United States for one to solicit campaign contributions in a public building, for the reason that, as stated by the Supreme Court in both of the cases just cited, *that one may solicit by letter as well as in person*, and particularly because the Court says that if the letter had never reached the person to whom addressed, there was no solicitation, the Court saying:

"If the letter had miscarried or been burned, the defendant would not have accomplished the solicitation."

Let us further illustrate the proposition. The addressee received from appellant, through the United States mails, a letter soliciting an order for intoxicating liquors. He received such letter in West Virginia. The postal authorities, after delivery no longer had control of the letter. The addressee could do as he pleased with it. Suppose he had destroyed it without reading or otherwise learning its contents. *No solicitation, no offense.* But he did *not* destroy the letter. He learned its contents—he had been solicited in West Virginia—an offense was committed in West Virginia, *after delivery of the letter by the postoffice.*

It may be said, however, that such holding would interfere with the use of the mails. Not at all. Had appellant's personal representative come into the state in person and solicited, and been apprehended, could it be said that he had committed no offense, because to so hold would be interfering with interstate commerce?

We submit the principle contended for here is further supported by the case of

*State v. Morrow*, (S. C.) 18 S. E., 853.

*Morrow* sent by mail from Washington, D. C., to a woman in South Carolina certain pills to be used for certain purposes. He suggested, by letter the use of the pills to cause abortion. To suggest abortion, or aid the same, was an offense by the statute of South Carolina. The pills were received, the advice of *Morrow* acted upon, resulting in connection with other things, in the death of the woman. *Morrow* was indicted and convicted in South Carolina for a statutory offense. The offense was not committed by mailing the pills. For some purposes they might have been lawful.

The Supreme Court of South Carolina, in the opinion, said:

"Upon the same principle, it seems to us that when the defendant procured the pills in Washington, and put them in the mail to be delivered to Colie Fowler in Columbia, for the unlawful purpose charged, it was, in contemplation of law, the same thing as if he had there delivered the pills to the woman for whom they were intended, in his own proper person. Instead of coming in person to Columbia to deliver the pills, he simply employed the agency of the mail to do the act which he desired to have done, and which was done by his express authority and direction in this state."

The Court held that it was immaterial that the of-

fense charged was a statutory offense independently of common law offense.

The Circuit Court of Appeals for the Fourth Circuit, in the State of West Virginia *vs.* Adams Express Co., 219 Fed., at pages 799 and 800, said:

"6. The right of the state to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another state, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show the relief of injunction is not dependent on this consideration.

"7. It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetuate a murder by poison, or to solicit contribution of office holders in violation of the civil service law, or to obtain goods under false pretenses. In *re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; *United States v. Thayer*, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; *Hayner v. State*, 83 Ohio St. 178, 93 N. E. 900; *State v. Morrow*, 40 S. C. 221, 18 S. E. 853."

In *Advertiser Co. v. State etc.*, (Ala.) 69 Sou. Rep., p.

501, a statute of like nature to the one under consideration here, although not in like terms, was sustained by the court of last resort of Alabama.

Finally, conclusive as to the interpretation of the statutes under consideration, and conclusive as to the rights guaranteed to a citizen of the state under the state constitution, is the case of *State v. Davis, supra*. The same statute and the same questions now under consideration here, were considered and passed upon by the court of last resort of appellee state in the case of *State v. Davis, supra*. The statute was interpreted as applying to interstate transactions and as to intoxicating liquors intended for personal use; and the statute was sustained and held to be constitutional under both state and federal constitutions. The syllabus of the case is as follows:

“A liquor dealer residing and doing business in another state, who, by the agency of the United States mails, sends into this state unsolicited and here circulates or distributes to prospective customers price lists, circulars and order blanks, advertising his liquors for sale and which he proposes to ship into this state to them, and which advertising matter by such agency is actually delivered to a citizen of this state, is guilty of a violation of section 8, chapter 13, Acts of the Legislature of 1913, known as the Yost law (Code 1913, c. 32A, Sec. 8 [sec. 1287], ) and may be here indicted and punished as provided by said act.

“So construed, said act, by virtue of the acts of Congress known as the Wilson Act (Act. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1913, sec. 8738] ), and the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. Sec. 8739] ), does not infringe the commerce clause of section 8 of article 1 of the federal constitution.

“Nor does the provision of section 8 of said act of 1913, so construed and applied, violate the ‘privileges and immunities’ clause of the Fourteenth Amendment to the federal constitution.

**THIRD.****Carrier Would Be Public Nuisance.**

Sections 14 and 17 of the Yost law are as follows:

"Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, building or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

"Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

"It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill



are true, the court shall order that no liquors shall be sold, bartered, given away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof for a period of not to exceed one year in the discretion of the court from and after such finding in case of a drug store; in other cases the order for abatement shall be perpetual,

"Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the impanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein."

It is submitted that any common carrier, such as appellant, would constitute itself a public nuisance, subject to injunction and abatement, if it carries, indiscriminately, intoxicating liquors into the state. *State v. U. S. Express Co.* (Ia.) 145 N. W., 451; *Southern Express Co. v. State* (Ala.), 66 So., 115. The proposition is so well stated in the opinion of the Circuit Court of Appeals in *State of West Virginia v. Adams Express Co.*, 219 Fed., at page 798, in paragraph 4, already hereinbefore quoted, that we refer to the paragraph and adopt it as part of this brief.

The Supreme Court of Appeals of West Virginia, in

*State v. Davis, supra*, S. E. Rep. (Vol. 87-3 page 266) well stated the proposition:

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offense of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the state by a common carrier would be in furtherance of the unlawful purpose of those violating the statute.

"Again, if orders should be obtained by means of circulars or other advertisements inhibited by the statute, and result in the sale and delivery of liquors within the state, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

#### FOURTH.

#### **Subsequent Legislation—Act, Regular Session 1915, and Act Second Extraordinary Session.**

Without the slightest concession to appellant's contention that sections 3 and 8 of the Yost law were not intended to apply, and do not apply to interstate shipments and solicitations for intoxicating liquors for personal use, we submit such contentions are now moot questions of construction.

At the regular biennial session of the West Virginia legislature, session 1915, section 7 of the original Yost law was amended. The original section reads as follows:

"The keeping or giving away of intoxicating liquors, or any shifts or devices whatever, to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act."

By act of the regular session of 1915, passed the 29th day of January, 1915, approved February 5, 1915, and

in effect thirty days from passage, now chapter 7, page 34 et seq., Acts 1915 of the West Virginia legislature, original section 7 was amended so as to read as follows:

"It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four) fruit stands, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however*, that nothing contained in this section shall prevent one in his home from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word "home" as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and *provided, further, however*, that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the

same are being kept and stored for unlawful purposes."

Among other provisions of the amended Section 7 is this:

"And, *provided, further*, that no common carrier, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections 4 and 24."

At the second extraordinary session of the West Virginia legislature, by an act passed May 24, 1915, approved May 29, 1915, and in effect ninety days from passage, there was added to the original Yost law an additional section numbered 34. Such section is chapter seven, Acts of said extraordinary session, and appears at page 660 "Acts of West Virginia Regular, Extraordinary and Second Extraordinary Sessions 1915." Said new section 34 reads as follows:

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however*, that druggists may receive and possess pure grain alcohol, wine and such preparations as may

be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

It is not the theory of plaintiff's bill, prayer or evidence that Rozier is a druggist; indeed, the whole theory of the bill and prayer is, that the defendant carrier be required to accept from plaintiff and carry and deliver into West Virginia *all* intoxicating liquors tendered to it for carriage when for the personal use of the consignees. *We submit that the Court will not grant relief to the plaintiff in error, in any event, if the Court finds it cannot grant effectual relief.*

#### **The Court Will Not Do a Vain Thing.**

In *Mills v. Green*, 159 U. S., 651, at page 653, the Court said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

To like effect is

*Campbell v. California*, 200 U. S., 87.

The cases of *The State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 Howard, 421, and *United States v. Schooner Peggy*, 1 Cranch, 37, we submit, are strikingly in point.

### Amendments Constitutional.

It will probably be contended by appellant that the legislature of West Virginia did not have the constitutional power to enact amended section 7 or the additional section 34, either under the state or federal constitutions. It will probably be said that the acts under consideration deprive the citizen of his guaranteed constitutional rights under (1) the constitution of West Virginia and (2) under the commerce clause of the constitution of the United States and the Fifth and Fourteenth Amendments to the federal constitution.

Counsel for appellant has heretofore relied very largely upon the case of *State v. Gilman*, 33 West Va., 146, particularly to sustain the contention that the Yost law and the amendments under consideration, construed as contended for by us herein, violate state and federal constitutions. We have hereinbefore in this brief analyzed the amendment of 1912 and by that analysis endeavored to show that the amendment deprived the legislature of the power to enact laws that would permit the manufacture or sale of intoxicating liquors in the state even for personal use. We have endeavored to show the purpose and intent of the constitutional amendment and the laws enacted pursuant thereto. We have endeavored to show that the Yost law and the amendments thereto have been enacted pursuant to the mandate of the amendment so as to carry into effect the intent and purpose of the amendment. Counsel for appellant can no longer rely upon the case of *State v. Gilman supra* to sustain their contention. It has been distinguished by the Supreme Court of Appeals of West Virginia in *State v. Sixo, supra*. Section 31 of the Yost law makes it an offense

“for any person to bring or carry into the state or from one place to another within the state, even when intended for personal use, liquors ex-

ceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the top or side of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kinds of liquors contained therein."

Sixo had in his possession four quarts of whiskey, two quarts of rum and four pints of beer. Such liquors had been carried by him into the state, and he claimed the same were intended for his personal use. The court, stating the case, in part, says—87 S. E., 269 (Vol. 3) Jan. 8, 1916:

"But it is insisted by counsel for plaintiff in error that said section 31 of chapter 7 of the Acts of the legislature of 1915 is unconstitutional and void. Counsel argued at great length to prove that the legislature could pass no valid act making it an offense for a person to have in his possession liquors, unless for some improper purpose. The case of the State *v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, is cited, among others, and relied upon as sustaining this contention. This court held in *State v. Gilman* that a statute—'which provides that no person without a state license therefor, shall 'keep in his possession, for another, spirituous liquors,' etc., is unconstitutional and void.'"

\* \* \* \*

"Since the case of *State v. Gilman* was decided, the Constitution of the state has been amended. The Constitution, as amended, prohibits the manufacture and keeping for sale of malt, vinous, and spirituous liquors, etc., and required the legislature to 'enact such laws, with regulations, conditions, securities, and penalties as may be necessary to carry into effect the provisions of this section.' This amendment became effective July 1, 1914. It is the duty of the Legislature to enact such laws as may be necessary to make effect-



ive this provision of the Constitution as amended. The Legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the state, or carried from one place to another within the state, in quantities of one-half gallon or more, to be marked or labeled. Whether or not this is a wise policy is not for the courts to determine. If the Legislature has not exceeded its powers, the courts cannot interfere. The courts may decide whether or not the Legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; this would be to subordinate the will of the Legislature to the opinion of the courts.

"The regulations provided for in said section, requiring liquors brought into the state, or carried from one place to another within the state, exceeding in the aggregate one-half of one gallon in quantity, to be marked or labeled, do not seem to be unreasonable, or as imposing any hardship upon persons who do not wish to violate the law."

In the Sixo case the Court also held—fourth point of the syllabus—

*"It was within the legislative power to enact the statute named in the foregoing point and said part of said statute creating such offense does not conflict with any of the provisions of the constitution of the United States or of this state."*

In *State v. Davis*, *supra*, the transactions were interstate and the intoxicating liquors seemingly intended for personal use. The Supreme Court of Appeals of West Virginia, in the *Davis* case, held the Yost law valid under the state constitution and did not violate the commerce clause of the federal constitution nor the privileges and immunities clause of the Fourteenth amendment to the federal constitution in determining the questions arising in the *Davis* case. Moreover the Supreme Court of

Appeals of West Virginia practically adopts the interpretation of Chief Justice Clark's concurring opinion in *State v. Cardwell*, *supra*, thereby giving to such concurring opinion peculiar weight in the case at bar, we submit, inasmuch as such concurring opinion is for all practical purposes the adopted interpretation of the Webb-Kenyon law and the application of the Webb-Kenyon law to the provision of the Yost law under consideration in the case.

Section 34 of the Yost law, made an additional section to the Yost law by the act of May 24, 1915, *makes it an offense for any person in appellee state to receive, or possess directly or indirectly, intoxicating liquors from a common or other carrier; the section, by its terms, applies to such liquors in interstate as well as intrastate shipments, and whether intended for personal use or otherwise*, subject to the exceptions in favor of druggists, etc. specified in the section. In principle section 34, comes, we submit, within the spirit of the interpretation by the Supreme Court of Appeals of West Virginia, of the provisions of the Yost law referred to in *State v. Davis* and *State v. Sixo*, *supra*.

Section 12 of the Bonner Law of Alabama makes it unlawful for any person, firm or corporation to receive or accept delivery of or to possess more than a specified quantity of intoxicating liquors within a specified period. The Supreme Court of Alabama in

*Southern Express Co. v. Whittle*, 69 Sou. Rep., 652, held:

"The Webb-Kenyon Law divests intoxicating liquors of their character with reference to interstate commerce in the cases contemplated and described in the act, and in such cases intoxicating liquors can only be regarded, when transported from one state into another, as if the federal Constitution had not contained the commerce clause,

and, so construed, the act is not invalid, as delegating federal authority to the states.

"The Webb-Kenyon Law prohibits the entering in interstate commerce of intoxicating liquors, where the purpose is unlawful under valid state statutes, and any valid exercise of the police power of the states is not a regulation of interstate commerce.

"Const. 1901, Sec. 1, guaranteeing the right of life, liberty, and the pursuit of happiness, and section 35, declaring that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions it is usurpation, do not restrict the rightful exercise of the police power by the state; and the Legislature may ascertain when the welfare of the people requires the exercise of the police power, as well as what are appropriate measures to that end, subject only to the right of the courts to see that the measures of police do not arbitrarily violate constitutional rights.

"Bonner Law (Act. Feb. 8, 1915; Acts 1915, p. 44) Sec. 12, making it unlawful for any person, firm, or corporation to receive, or accept delivery of, or to possess more than a specified quantity of intoxicating liquors within a specified period, is a valid exercise of the police power, and does not conflict with Const. 1901, Section 1, 35, guaranteeing the rights of life, liberty, and the pursuit of happiness, and limiting the rightful functions of government.

"This section is not in conflict with Const. U. Amend, 14, as abridging the privileges or immunities of citizens of the United States, or as depriving the citizens of life, liberty or property without due process of law.

In this case the Alabama court declined to accept as authorities *Eidge v. City of Bessemer*, 164 Ala. 599, and *State v. Gilman*, *supra*.

Chapter 97, Public Laws 1915, of the State of North

Carolina, contains provisions of very similar character to the Bonner law of Alabama. The Supreme Court of North Carolina, in *Glenn v. Southern Express Co.*, 87 S. E., 136, (Vol. No. 2, January 1, 1916) held:

"Prior to any legislation by Congress, the right to sell in the original package was inherent in the shipment of intoxicating liquors from one state to another; and while this right could not be interfered with by the state, it could be withdrawn by Congress.

"It is within the constitutional power of Congress to remove the impediment of the protection of interstate commerce to the enforcement of state laws and to subject intoxicating liquors to laws enacted by the states in the exercise of the police power upon their arrival in the state; and such action of Congress is not a delegation or grant of power to the state, but is a regulation of Congress, and the uniformity of such regulation is not affected by variations in state laws.

"The Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699. [U. S. Comp. St. 1913, Sec. 8739] ), prohibiting the transportation of intoxicating liquors into a state, to be received, sold, or used in violation of state laws, thereby divesting such shipments of their protection under the commerce clause of the federal Constitution, but not expressly designating any power to the states, is constitutional.

"The 'police power' is a power originally and always belonging to the states, which was not surrendered by them to the general government, and is the power to protect the lives, health, safety, and property of its citizens, and to preserve good order and public morals, and to govern men and things by any legislation appropriate to that end; a power which is, and from its very nature must be, incapable of any very exact definition or limitation.

"Pub. Laws 1915, c. 97, entitled 'An Act to restrict the receipt and use of intoxicating liq-

uors', enacted as a means of enforcing the state policy of prohibition, in section 1 making it unlawful to ship, carry or deliver in any one package or at any one time from a point within or without the state to any person in the state any intoxicating liquors in a quantity greater than one quart, in section 2 making it unlawful for any person to receive at any one time, or in any one package, at a point in the state for his use, more than one quart of intoxicating liquor, and in section 3 making it unlawful for any person during 15 consecutive days to receive more than one quart of intoxicating liquors, is a legitimate and reasonable exercise of the police power.

"The Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Com. St. 1913, Sec. 8739] ) prohibits the transportation of intoxicating liquors into a state to be received, sold, or used in violation of state law, thereby divesting such shipments of their protection under the commerce clause of the Constitution. Pub. Laws 1915, c 97, Sections 1-3, makes it unlawful to ship, carry, or deliver more than one quart of intoxicating liquor in any one package, or at any one time, from a point within or without the state to any person within the state, and makes it unlawful to receive more than one quart of intoxicating liquor in 15 days. *Held*, that an express company which had brought into the state and delivered to plaintiff a quart of whiskey, was not liable for refusing to deliver another quart to him on the following day, or for refusing to accept, at a point in another state, a consignment of a gallon of whiskey to plaintiff in this state.

While the laws of Alabama and North Carolina are not, in identical terms nor provisions, the same as amended section 7 and additional section 34 of the Yost law, yet it is submitted that, in principle the laws considered by the courts of Alabama and North Carolina, and the laws being considered here, are alike in principle and

that the reasons and principles governing the Alabama and North Carolina cases also control and govern said amended section 7 and said additional section 34 of the Yost law.

### **FIFTH.**

#### **Webb-Kenyon Law and Yost Law Are Not in Contravention of Commerce Clause of the Federal Constitution or the Fifth and Fourteenth Amendments Thereof.**

Counsel for appellant will probably contend

"that if the constitution and laws of West Virginia properly construed have the effect given them by the judgment below, that they are in contravention of the commerce clause of the Constitution of the United States and the Fourteenth Amendment; that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law does not authorize the state of West Virginia to apply its constitution and laws to interstate commerce in liquors for personal use, in the manner in which they were applied by the court below; that if the Webb-Kenyon Law does authorize the state of West Virginia to so apply its constitution and laws to such commerce, the Webb-Kenyon Law is repugnant to the commerce clause of the Constitution of the United States and the Fifth Amendment."

#### **Webb-Kenyon Law Is Constitutional.**

We submit the Webb-Kenyon law does not delegate to the states any power that Congress has over interstate commerce; nor does it confer upon the states the power to regulate interstate commerce. *Congress did, however, in its enactment, simply withdraw from intoxicating liquors the protection of the interstate commerce clause of the Federal constitution, when such liquors are shipped into a state in violation of its laws.*

The Wilson act has been held to be constitutional and has been applied in such cases as *In re Rahrer*, 140 U.

S., 545, and *Delamater v. Dakota*, 205 U. S., 93. The Webb-Kenyon law is the same in principle as the Wilson act, but goes further and is more drastic.

The proposition is so briefly, and yet so clearly, stated, by the United States Circuit Court of Appeals in *State of West Virginia v. Adams Express Co.*, 219 Fed., page 802 of the opinion, that we now here quote the same.

"The constitutionality of the Webb-Kenyon statute is attacked on the ground that it is an attempt by Congress to confer on state legislatures the power to regulate interstate commerce. This we think, is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex parte, Rahrer, supra.* Lottery Case, 188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed., 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913, E, 905; *Hipolite Egg Co. v. United States* 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

"The following language of Mr. Justice White in *Vance v. Vandercook*, 170 U. S., 438, 18 Sup. Ct., 674, 42 L. Ed. 1100, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license state to a prohibition state:

" 'On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own



use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States.'

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

"As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the states of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy."

#### **State Laws Are Constitutional.**

The states are possessed of their reserved police power.

This power they did not surrender to the federal government. It must be conceded that the state is possessed of the power to forbid sales of intoxicating liquors within its own borders, even when intended by the buyer for personal use. WOULD IT BE SUGGESTED THAT ONE CAN SELL TO ANOTHER INTOXICATING LIQUORS WITHIN THE BORDERS OF THE STATE, EVEN FOR PERSONAL USE, WHEN THE LAW OF THE STATE FORBIDS THE SALE OF SUCH LIQUORS? IF THE STATE CAN DENY THE OUTSIDE DEALER THE RIGHT TO SOLICIT ORDERS FROM ITS CITIZENS, UNDER THE WILSON LAW, WHEN THE CITIZENS DESIRE THE INTOXICATING LIQUORS FOR PERSONAL USE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, (*Delamater v. S. Dakota*, 305, U. S., 93; *State v. Miller*, 66 W. Va., 436) WHY CANNOT THE STATE, SINCE THE ENACTMENT OF THE WEBB-KENYON LAW, DENY THE RIGHT OF SHIPMENT OR TRANSPORTATION OF SUCH LIQUORS INTO THE STATE FOR SUCH PERSONAL USE? IF THE STATE CAN DENY ITS CITIZENS THE RIGHT TO PURCHASE INTOXICATING LIQUORS FROM ONE ANOTHER, FOR PERSONAL USE, WITHIN THE STATE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, WHY CAN IT NOT NOW DENY ITS CITIZENS THE RIGHT OF SHIPMENT TO THEM, BY A CARRIER, OR RECEIPT OR POSSESSION FROM SUCH CARRIER OF SUCH LIQUORS FOR SUCH USE? WE SUBMIT THE STATE CAN DO SO FOR THE APPARENT REASON THAT CONGRESS HAS DIVESTED INTOXICATING LIQUORS OF THEIR INTERSTATE CHARACTER, WHEN THE "SHIPMENT" OR "TRANSPORTA-

TION" THEREOF INTO A STATE, IS IN VIOLATION OF THE LAWS OF THE STATE.

County local option laws have been repeatedly upheld. Provisions in such laws forbidden shipments into counties for personal use have been repeatedly upheld, when the shipments were intrastate. Indeed we do not recall any decision to the contrary.

The effect of such local option laws, depriving, or tending to deprive, a citizen of intoxicating liquors for his personal use, has never led the courts to declare such laws, a deprivation of the constitutional rights, state or federal, of the citizen. Since the enactment of the Webb-Kenyon law, we submit, the same principle is now applicable to *interstate* shipments, that is applicable to *intrastate* shipments under local option laws.

In the majority report from the House Committee of the Judiciary, respecting the Webb-Kenyon Act, report No. 1461, 62d Congress, 3d Session, Feb. 7, 1913, hereinbefore referred to, this language is used:

"This bill might well be styled a local option act to give the various states the power to control the liquor traffic as to them may seem best. It would remove the shackles of interstate commerce law from the action of the states and discontinue the handicap under which they now labor, in enforcing their police regulations, and leave them freer to break up the blind tigers and bootleggers that infest many dry states."

Several of the state courts of last resort have sustained the constitutionality of the Webb-Kenyon law, and in the construction and application thereof to their several respective laws have sustained the views now contended for in this brief. Particularly do we rely upon such cases as *State v Adams Express Co.* (C. C. A.) 219 Fed. 794, concurring opinion Chief Justice Clark in *State v. Cardwell*, (N. C.) 81 S. E., 630, *State v. U. S. Express Co.*,

(Iowa) 145 N. W., 451, *So. Express Co. v. Whittle*, 69 Ala., So. 652, *Glenn v. Express Co.* (N. C.) 87 S. E. 136, *State v. Davis*, (W. Va.) 87 S. E., 262. In as much as many of these cases have been referred to at more or less length and must therefore necessarily come to the attention of the court, this brief will not be encumbered by quoting from the cases cited.

### SIXTH.

#### Conclusion.

At the time this brief is in preparation, the uppermost question of discussion in the Union is "preparedness."

This court has heretofore spoken for real preparedness in no uncertain tones. In the following cases the court has said:

"By the general concurrence of opinion of every civilized and Christian community there are few sources of crime and misery to society equal to the dram shop where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as a proper subject of legislative regulation. \* \* \* \* \* There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of a state, or a citizen of the United States, and as it is a business attended with danger to a community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evil." *Crowley v. Christensen*, 137 U. S. 86.

"It is not necessary for the purpose of justify-

ing the state legislation now under consideration to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. \* \* \* For we cannot shut out of view, within the knowledge of all, that the public health, the public morals and the public safety, may be endangered by the general use of intoxicating liquors; nor the fact, established by statistics accessible to every one that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, attributable to this evil." *Mugler v. Kansas*, 123 U. S. 623.

Contemporaneous events and the daily experience of sister nations now engaged in the greatest war the world has known all emphasize that a clean strong citizenship is the first essential of preparedness. Back of the munitions plant, back of the great gun, back of the trench, must be the man—the moral and physical man. Back of the man in the trench must be the man that directs the movements of millions of men; and back of the man in supreme authority must be a virile citizenship standing for civic and national righteousness. A citizenship not undermined by vice that unfits the mind to grasp the full duty of citizenship or unfits the body to defend the nation, whether in the shop, the field or in authority.

The great nations now at war have learned that one of the first essentials to preparedness is rigid restriction, or prohibition, of the use of intoxicating liquors—not alone as to the man in the field but to the citizens at home. The leading cabinet member of one of the great warring nations has recently declared his nation is fighting three great enemies, the greatest enemy being intoxicating liquors.

History teaches that all the great nations that have risen to splendor and fallen to decay were brought to their decline and end, not so much by forces without as the undermining forces within—forces within, which destroyed the morals and virtues of the citizens and thereby destroyed the nation's first line of defense—a healthy, vigorous and righteous citizenship.

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Immediately following the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the case of *State v. Adams Express Company*, decided January 13, 1915, cited herein, the common carriers operating in appellee state have refused to carry intoxicating liquors into the state as freight or express. The people of the state, almost without exception, are satisfied and do not desire the existing condition disturbed. In the mean time much good has come to the people of the state by reason of the prohibitory laws. Men have saved their means, women and children have been better fed and clothed, and there has been a general increase in happiness and contentment, and an uplift toward a better citizenship. To grant appellants prayer means to largely destroy much of the good that has been accomplished, and to turn back the march of progress.

It is submitted appellant should be denied the relief sought by it.

Respectfully submitted,

FRED O. BLUE,

*Counsel for State of West Virginia,*  
*Appellee.*





## INDEX.

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Questions presented in brief.....	3
Constitutionality of law of West Virginia..	4
Constitutionality of Webb-Kenyon law.....	20
West Virginia Anti-Shipping Law making place of delivery place of sale is constitutional...	4
Validity as to interstate shipments.....	20
Validity as to intrastate shipments.....	4
Cases cited by appellant.....	7
Purpose of prohibitory legislation to prevent use, etc. ....	15
Decision sustaining similar legislation..	20, 39
Webb-Kenyon Law constitutional.....	20
Power of Congress over interstate commerce plenary .....	27
Congress has power to prohibit deleterious commodities .....	27
Congress may prohibit entirely or do less...	28
Articles prohibited through interstate com- merce .....	29
Congress power to enact laws under police . regulations .....	30
Same power to prevent shipment of liquor as lottery tickets.....	31
Congress has not delegated legislative power.	32
Cases cited by appellant distinguished.....	33
Presumption as to constitutionality.....	38
Recent decisions sustaining constitutionality of act .....	39

## INDEX.

### Index of Cases.

American Express Company vs. Beer (Miss.), 580 .....	28
Atkinson vs. Southern Express Company, 94 S. C., 444, 78 S. E., 516, 48 L. R. (N. S.), 349. .	34
American Express Company vs. Beer, 65 Sou., 581 .....	34, 39
Addyson In re, 175 U. S., 211.....	30
Buttfield vs. Stranahan, 192 U. S., 470.....	21, 23
Commonwealth vs. State, 163 Ky., 227.....	7
Crowley vs. Christensen, 137 U. S., 86....	6, 15, 28
Champion vs. Ames, 188 U. S., 356.....	23, 27, 31
Delameter vs. South Dakota, 205 U. S., 93.....	16
Eidge vs. Bessemer, 164 Ala., 599.....	7, 14
Feibelman vs. State, 130 La., 122.....	19
Frisbie vs. U. S., 157 U. S., 160.....	22
Goddard vs. The Town of Jacksonville, 15 Ill., 589 .....	18
Hart vs. State, 87 Miss., 171.....	4
Hippolite Egg Co. vs. U. S., 220 U. S., 45.....	29
Hoke vs. State, 227 U. S., 309.....	27, 30
Mugler vs. Kansas, 123 U. S., 623.....	6, 8, 15, 28
Northern Securities Case, 193 U. S., 34....	22, 23
Our House No. 2 vs. The State, 4 Freem (Iowa), 172 .....	18
Phalen In re, 8 Howard, 161.....	30
Purity Extract Co. vs. Lynch, 226 U. S., 201..	6, 8, 13
Palmer vs. Southern Express Co., 165 S. W. (Tenn.), 244 .....	36, 40
Pennal vs. State, 123 N. W. Rep.....	19
Rippey vs. Texas, 193 U. S., 504.....	28
Rahrer In re, 140 U. S., 562.....	21, 25

# INDEX.

Rhodes vs. Iowa, 170 U. S., 412.....	25
Reid vs. Colorado. 189 U. S., 137.....	29
State vs. United States Express Co., 145 N. W., 458 .....	28, 32
State vs. Doe, 139 Pac., 1170.....	28
Southern Express Co. vs. State, 66 Sou., 115....	35
State vs. Frederickson, 101 Me., 37.....	19
State vs. Williams, 146 N. C., 618.....	7, 8
State vs. Gilman, 33 W. Va., 146.....	7
State vs. Walder, 83 O. S., 68, at p. 84.....	19
State vs. Cardwell, 81 S. E., 630.....	40
Santo et al. vs. State, 2 Iowa, 165, 190.....	32
State vs. Herring, 145 N. C., 418, 58 S. E., 1007, 112 Am. St. Rep., 461.....	4
State vs. U. S. Express Co., Sup. Ct. Iowa, 145 N. W. Rep., 451.....	32
State vs. Doe, 13 Pac. (Kas.), 1169.....	40
Southern Express Co. vs. State, 66 So. (Atl.), 115, p. 124 .....	28
U. S. vs. Gallons Whiskey, 93 U. S., 188.....	23, 29
United States vs. Popper, 98 Fed., 423.....	29
United States vs. Marigold, 9 How., 560....	23, 28
United States vs. Halliday, 3 Wall., 409.....	23, 26
Van Winkle vs. State, 91 Atl. (Del.), 385....	33, 39
Williams vs. State. 179 Ala., 50.....	9, 14
West Virigina vs. Adams Express Co., Fed. Rep., Vol. 219, No. 4, p. 794.....	39, 40

IN THE  
**Supreme Court of the United States**

October Term 1914.

No. 858.

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THE JAMES CLARK DISTILLING COMPANY,  
Appellant,

vs.

THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA,  
Appellee.

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**BRIEF FOR THE STATE OF WEST VIRGINIA,  
APPELLEE.**

The construction of the West Virginia law and the State Prohibition amendment of West Virginia, have been fully discussed in a very able brief filed in this case by Fred. O. Blue, counsel for the State of West Virginia. In the brief which we submit herewith we confine ourselves to two propositions which are involved in this case:

First: Has the State of West Virginia the authority to make the place of delivery the place of sale for both **inter** and **intra** state shipments?

Second: Is the Webb-Kenyon law constitutional?

**THE STATE OF WEST VIRGINIA HAS LEGISLATIVE AUTHORITY TO ENACT A LAW MAKING THE PLACE OF DELIVERY THE PLACE OF SALE.**

It is a well settled proposition that so far as *intra* state shipments of liquor are concerned, the state may enact laws making the *place of delivery* the *place of sale*. The Supreme Court so held in the case of *Louisville and Nashville Railroad vs. Cook Brewing Company*, 223 U. S., p. 70, in the following language:

“Valid as the Kentucky legislation doubtless was as a regulation in respect to intrastate shipment of such articles, it was most obviously never an effective enactment insofar as it undertook to regulate interstate shipments to dry points.”

See also:

*State vs. Herring*, 145 N. C., 418.

*Hart vs. State*, 87 Miss., 171, etc.

Counsel for appellant rely largely on certain decisions in Kentucky to sustain their proposition that the place of delivery cannot be made the place of sale when the liquor is shipped for the personal use of the consignee, quoting *Comm. vs. Campbell*, 133 Ky., 50; *Adams Express Co. vs. Comm.*, 154 Ky., 462, and several other Kentucky cases.

These cases were decided upon the authority of certain provisions of the Constitution of Kentucky that perhaps will not be found in the Constitution of any other state. It was shown by Judge Barker, that in the Constitutional Convention, there were two forces, one to banish liquor from the state and on the other hand those who were en-

gaged in the business of manufacturing and selling liquor and who advocated the utmost freedom for the citizens with reference to the sale and use of liquor. It was evident that the manufacturers and dealers controlled the situation because there was embodied in the Constitution a section providing that the General Assembly should not pass local or special acts to provide a means of taking the sense of the people of any city, town, district, precinct or county whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquor or alter liquor laws; it being further provided that the General Assembly shall by general law provide a means for that purpose. It was no doubt the idea of the manufacturers that it would be much easier to obtain a local option law for a smaller subdivision than it would for the whole state, and thus they would retard any restrictive legislation. Under these sections of the Constitution, it was held that the Convention did not intend to leave it in the power of the legislature upon its own motion to prohibit the possession of liquor by the citizen. Barker, Justice, said:

"We cannot believe that the framers of the constitution intended thus carefully to take from the Legislature power to regulate the sale of liquor and leave with that department of the state government greater power of prohibiting the possession or ownership of liquor."

If the court of last resort in Kentucky has construed their Constitution correctly, then there is a clear distinction between the cases which might arise in Kentucky and the case under the West Virginia law. In West Virginia the people have by their constitutional amendment made clear their intention to prohibit the manufacture and sale of liquor except as provided in the amendment.

and by law. While we do not agree with the conclusions of the Court of Appeals of Kentucky in their construction of the Constitution, yet if their construction of the Constitution was correct it would be no authority for holding that the law making the place of delivery the place of sale in a state like West Virginia, would be unconstitutional.

West Virginia has a Constitution concerning whose purpose and intent to prohibit the manufacture and sale of liquor, there can be no doubt. There is no limitation on the Legislature in accomplishing that purpose. It is true the Kentucky court, after deciding the point above referred to, went into the consideration of the "History of our state from its beginning," and also referred to its Bill of Rights declaring the inalienable rights possessed by citizens and, "that the absolute and arbitrary power over the lives, liberty and property of freedom exists nowhere in the republic, not even in the largest majority." Construing all these provisions in the Constitution supported by some certain expressions in Blackstone's Commentaries and in a work on Liberty by John Stewart Mill, the court discussed sumptuary legislation in general. We respectfully submit that the right to sell liquor, or use liquor is not one of the inalienable rights guaranteed to a citizen under the Constitution of the United States, or of a state like West Virginia.

Crowley vs. Christensen, 137 U. S., 86.

Mugler vs. Kansas, 123 U. S., 623.

Purity Extract Co. vs. Lynch, 226 U. S., 201.

See also pages 11 to 28 of brief in case 271.

It is easily conceivable that other courts under different conditions than that which obtains in Kentucky,



would not agree with the view of the Kentucky Court of Appeals. Each state has the right to determine for itself what its police powers shall embrace, subject of course to the Constitution of the state and that of the United States.

### **CASES CITED BY APPELLANT DISTINGUISHED.**

In appellant's brief, pages 35 and 36, it is claimed that the rule of the Kentucky cases is followed in *State vs. Williams*, 146 N. C., 618; *Eidge vs. Bessemer*, 164 Ala., 599; *Comm. vs. Smith*, 163 Ky., 227, and *State vs. Gilman*, 33 W. Va., 146. We respectfully deny that these cases are authority for the contention made against the West Virginia law.

These cases were discussed by the Supreme Court of Mississippi in the case of *Phillips vs. State*, 67 Sou. Rep., 651. In respect to the Alabama case it held that the dissenting opinion therein of Justice McClellan, concurred in by two other judges, presented the sounder view, and it was adopted as the law of the case by the Mississippi court.

In reference to the case of *State vs. Gilman*, *supra*, it said:

"The Supreme Court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors of another by any person not the owner who had not obtained a license therefor. The decision went off upon the court's interpretation of the state Constitution, which declared, 'laws may be passed regulating or prohibiting the sale of intoxicating liquors.' The court invoked the maxim '*Expressio unius est exclusio alterius*,' holding that the statute not having reference to the prohibition or sale of liquors, the legislature was without power to pass the statute. The court also held that the statute could not be upheld as coming

within the police power of the state. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering and besides the question before the court was complicated by the Constitution of West Virginia."

(This decision was rendered before the new Constitution was adopted.)

Of the North Carolina case, *State vs. Williams*, supra, after quoting the syllabus as to the point decided, it said:

"This case was also decided by a divided court. We mention this fact for the purpose of showing that decisions along this line have usually found some judge of the court who dissents. We think the dissenting opinion in this case propounds a question hard to answer, and we quote the same, because, in our opinion it demonstrates the fallacy of the court's reasoning, viz.:

" 'In limiting each person to a half gallon per day for his own use (for the law permits no sale), the Legislature was not niggardly. Besides, if the manufacturer, though exclusively for one's own use and out of one's own apples and peaches, in the county can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than a half gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the Legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the Legislature, subject only to review by the people, not by the courts.' "

It may also be said that the decision in this case was itself complicated by a provision in the Constitution of North Carolina, which was quoted and relied upon in Judge Connor's opinion. Said provision was that "among the inalienable rights of all men are life, liberty

and the enjoyment of **the fruits of their own labor**, and the pursuit of happiness, of which they cannot be deprived but by the law of the land," and thereupon said:

"If either the spirits, wine or beer, which the defendant had on the tenth day of July, 1907, was his property, it was by virtue of the constitutional guarantee **that he shall enjoy the fruits of his own labor and pursue his own happiness**, entitled to carry it with him wherever he went and apply it to his own use in such manner as he saw fit, unless prohibited by some law enacted in accordance with and in the exercise of the power conferred upon the legislature."

Again: "Assuming that the wine or spirits described in the bill of indictment was the defendant's property, **the fruits of his labor**, he was entitled to carry it with him wherever he went, unless in doing so he injuriously affected the public morals, health or safety, or that his doing so was reasonably related to the sale of intoxicating liquor, which is the thing prohibited in Brook county, as to come within the police power. It is no answer to his contention to say that if spirits, he would probably risk it, or if wine, permit his family to use it for domestic purposes, because the law does not prohibit him from doing either."

Eidge vs. Bessemer, 164 Ala., 599.

(a) This case should be studied in connection with the case of Williams vs. State, 179 Ala., 50, in which the opinion was written by the same judge who wrote the decision in Eidge vs. Bessemer, and in which the Bessemer case is explained and limited.

It should also be studied in connection with the decision of the Supreme Court of Mississippi in State vs. Phillips, 67 Sou. Rep., 651, in which many authorities are cited showing that the great weight of authority was against the decision of the majority of the court, and in support of the dissenting opinion of Justice McClellan, concurred in by Justices Simpson and Denson.

In the first place the Alabama case did not involve the question as to whether or not the state of Alabama by its legislature could prevent a citizen from owning or possessing liquors for his own use, or can restrict the quantity of liquor he might own or possess for such use, or for other purposes. The question involved was the validity of a municipal ordinance of the town of Bessemer, forbidding "the having or keeping in storage or deposit of intoxicating liquors in or at any place where any drinks or beverages are sold or kept for sale." At that time Alabama had not enacted any statute limiting the quantity that any citizen might purchase or possess for his own use, and the court was dealing also with a municipal ordinance.

Judge Sayre first laid down the proposition that intoxicating liquors were property, a proposition that no one had ever disputed. The ordinance did not deprive the owner of liquors of his property, but only restricted him as to one place in respect to the point or place at which he might keep or store said liquors. In the opinion he laid emphasis on the fact that "the ordinance in question makes an offense against the municipality of those acts which are not denounced by the law of the state." Hence it would seem that if the same provision had been contained in a state statute it would have been considered from a different standpoint.

In view of this case, it should be studied in connection with the Georgia case of *Henderson vs. Heyward*, 109 Ga., 373, 47 L. R. A., 366, 77 Am. St. Rep., 384. That case also dealt with a municipal ordinance and it was held that under the general welfare clause of its charter, the city had no authority to pass an ordinance making penal the buying of alcoholic liquor since that policy had

never been adopted by the state legislation. In that case Judge Cobb said:

"It may be that the state would have the right to prohibit the purchase of whiskey; that the state has a right to prohibit absolutely the sale of whiskey is no longer an open question either in this court or the Supreme Court of the United States."

And furthermore,

"It may be contended with great force that if the state, notwithstanding its recognized property right in alcoholic liquors, can under its police power entirely destroy the right of the owner of said liquors to sell or dispose of the same within the limits of the state, which would in some instances be a practical confiscation of the property, it has the power to declare that no person shall by purchase come into possession of such property within the limits of the state. Laws prohibiting the sale of whiskey are upheld as constitutional upon the ground that its sale is against the best interests of the public at large, and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and good order of society, as well as the welfare of the individuals. **If this be true**, it would seem to follow that the state might enact any law which would effectually prohibit the traffic. A law prohibiting the sale would if effectually enforced, prohibit the buying; and so also the prohibition of the purchase would likewise prohibit the sale. The prohibition of the sale, therefore, puts a ban upon the entire traffic. Of course, a law making penal the sale would not, without more, make penal the buying; but the practical effect of such a law if enforced would be to prohibit the buying. It would seem to follow, therefore, that the state might go further than it has already gone, and make penal the buying."

Making this concession, the court said, however, that a municipal corporation could not without express legislative authority make penal the buying of alcoholic liquors from one lawfully authorized to sell the same.

It may be interesting to note that since the decision of the Eidge vs. Bessemer case the Supreme Court of Alabama in the Fuller prohibition law of August 25, 1909, Section 16 thereof) has enacted a section as follows:

“That it shall be unlawful for any person, firm or corporation engaged in the business of selling beverages to keep or store on the premises where said beverage business is conducted any prohibited liquors or beverages, the sale, offering for sale or other disposition of which is prohibited by the laws of Alabama, and any person so violating this section shall be guilty of a misdemeanor; and this section is enacted to prevent evasions of the law and to remove the opportunity of evading the law by selling prohibited beverages under cover of legitimate beverage business.”

(b) One of the authorities cited by Judge Sayre to the effect that intoxicating liquors is property, was the case of Preston vs. Drew, 33 Me., 558, 54 Am. Dec., 639, in which the court said:

“When a person is deprived of the possession of his property without lawful authority or right, he is injured in his property. The state, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.

“It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such purpose is injurious, and suited to produce by greater use, serious injury to the comfort, morals, and health; that the common use of them for such purpose operates to diminish the productiveness of labor; to injure health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience to law; to disturb the peace, and to multiply the crimes of every grade. Such conclusions would be justified by the experience and history of man. If a

legislature should declare that no person should acquire any property in them for such purpose there would be no occasion for complaint that it had violated any provision of the Constitution."

(c) In the Bessemer case, Judge Sayre admitted that the ordinance could have been upheld if it sustained "some reasonable relation to the prohibition law in the way of preventing evasions of that law by trick, artifice or subterfuge, under guise of which that law is violated." He then said it had no such relation.

It is submitted that the reasoning of Judge McClellan's dissenting opinion and that of the Mississippi court in the case of the State vs. Phillips, *supra*, is overwhelming against the correctness of Judge Sayre's holding.

His holding, which was that of four out of seven judges is also shown to be contrary to the cases cited by the Mississippi court on page 654, 67 Sou. Rep., to wit:

- Selma vs. Brewer, 9 Cal. App., 70, 98 Pac., 61.
- Charleston vs. Heisembrittle, 2 McM., 233.
- State vs. Clark, 28 N. H., 176, 61 Am. Dec., 611.
- Cohen vs. State (7 Ga. App., 5), 65 S. E., 1096.
- Easley v. Pegg, 63 S. C., 98, 41 S. E., 18.
- Wright v. Macon, 5 Ga. App., 750, 64 S. E., 807.

The holding is also against several rulings made by the Supreme Court of the United States, wherein it is declared "it does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the **legislative judgment** to accomplish a purpose within the admitted power of the government."

Purity Ex. & T. Co. vs. Lynch, 226 U. S., 192, 57 L. ed., 184, 187.

Booth vs. Ill., 184 U. S., 425, 46 L. ed., 623.

Otis vs. Parker, 187 U. S., 606, 47 L. ed., 323.

A. Shin. vs. Whitman, 198 U. S., 500, 504, 49 L. ed., 1142.

Murphy vs. Calif., 225 U. S., 623, 56 L. ed., 1229.

Patson vs. Penn., 232 U. S., 138, 58 L. ed., 539.



(d) In *Williams vs. State*, 179 Ala., 50, the constitutionality of a statute was sustained, which made it "unlawful for any person, firm or corporation, whether a common carrier or not, to convey or transport over or along any public street or highway any of such prohibited liquors for another," which liquors included whiskey, beer, wine, rum, and gin, and other intoxicants.

The case of *Eidge vs. Bessemer*, 164 Ala., 599, was cited as authority against the statute, and Judge Sayre said:

"Attention to the question there presented for review will disclose the fact that as against a **municipal ordinance** which was construed as prohibiting the keeping of intoxicating liquors for the personal use of the keeper, or rather perhaps as based upon a principle which involved the result, we endeavored to state some reservations in favor of the property rights and personal liberty of the individual with which the legislature of the state **had made no attempt to interfere.**"

It will thus be seen that this utterance is directly in line with the view of the Georgia court in the case of *Henderson vs. Heyward*, 109 Ga., 373, 47 L. R. A., 366.

Again he says:

"The object of the decision was to develop a statement of the right of persons in this state, **under existing conditions**, to keep liquors for their own use, to affirm the invalidity of **municipal ordinances** so broadly phrased as to deny that right."

The existing conditions to which he referred were the fact that under the existing legislation no law had been enacted forbidding the citizen to keep liquors for his own use anywhere.

He then said that an "inhibition against the carriage of liquors for delivery to another may be held to be within the legislative competency without a further con-

struction of those already narrow limits to which personal and property rights in respect to use and ownership of intoxicants has been confined by the very general agreement of the courts."

It is obvious here that in speaking of "already narrow limits" the judge did not recognize as correct, the broad and unlimited view of the right of the individual taken by the Court of Appeals of Kentucky under the terms of the Kentucky Constitution, or even under its view of the inalienable rights of man in his natural state and state of society. With the light thrown upon the Bessener case by Judge Sayre's opinion in *Williams v. State*, it is very clear that it cannot be said that *Eidge v. Bess.* is any authority for the proposition that in West Virginia a citizen has a constitutional right to own and possess unlimited quantities of liquor for his own use, nor that the Alabama case is at all in accord with the ruling in the Kentucky cases.

The argument of the appellant against the West Virginia law is based upon the false presumption that a citizen has a constitutional right to buy or have liquor shipped to him for his personal use. Unless there is some specific provision in the Constitution of the state which guarantees to its citizenship this right, then there is no right. The following propositions are well settled:

There is no inherent right in a citizen to sell intoxicating liquor as a beverage for personal use, as was held in *Crowley vs. Christensen*, 137 U. S., 86. No one has any constitutional right to manufacture liquor for his own use. This was settled in the case of *Mugler vs. Kansas*, 123 U. S., 623. No one has any constitutional right to have a solicitor offer to sell him intoxicating liquors for his own personal use from outside of the state. Even

though the interstate common carrier brings the liquor to him. *Delameter vs. State*, 205 U. S., 93.

If a citizen has no constitutional right to manufacture liquor for his own use, or to have it sold, furnished or given to him for his own use, then it logically follows that he has no constitutional right to have in his possession, or use, a beverage which the law prohibits. In the brief in case No. 271, which we understand according to the motion granted is to be considered in connection with this case, we have given reasons on pages 20 to 28 why even in a state like Kentucky a citizen has no constitutional right to receive or possess intoxicating liquors except as provided by law. It certainly needs no extended argument to prove that the purpose of all prohibitory legislation is to decrease or prevent the use of intoxicating liquors as a beverage in the only effective way by which the government can deal with this recognized evil.

It is the function of government to deal with the acts of citizens in relation to other citizens. If the use of a certain commodity by a citizen is clearly injurious to society, then the government may step in and prohibit the use of such commodity. But the most effective way for the government to deal with these evils is to prohibit the means by which the individual receives or comes into possession of the injurious article or beverage. Consequently, laws are framed to prohibit the sale, furnishing, distribution or shipment of liquor to individuals in territory where such acts are prohibited. In each of these localities where these transactions are prohibited, individuals might want to secure the intoxicating liquor for their own personal use, but the courts have uniformly sustained the legislation referred to as to sale, furnishing and distribution of liquor and also intrastate ship-

ments of liquor into dry territory in violation of a state law.

The liquor interests have for years tried to confuse the people and the courts by claiming that there was no intention to interfere with the consumption, or use, of liquor because the law did not prohibit the buying or use of liquor. They well know that when the legislature prohibits the use, it makes it practically impossible to enforce the law.

On page 4 of the liquor dealers' first campaign document against prohibition this year, entitled, "Ohio Home Rule Almanac," we find this significant statement:

"The purchase and consumption of liquor should also be made a crime and every man who drinks should be punished. The Prohibitionist should not hesitate to go where his logic takes him."

If the liquor dealers' program prohibiting the liquor traffic was accepted in framing laws, we would have an anomalous situation, namely, a law with no witnesses available to prove its violation. Those opposed to the liquor traffic have for years told the liquor interests that they would agree to the law preventing the purchase of liquor, providing the state's witnesses should be immune from prosecution when they testified against the liquor dealer. They have persistently opposed the proposition. If the state makes the purchase or consumption of liquor an offense, then the witness who takes the stand admits his own guilt and consequently no witness could be secured for the prosecution. If the consumption of liquor was made an offense, the liquor dealer would deny that the liquor sold was intoxicating and any one who tasted it or consumed it, and gave testimony concerning the fact in question, would be a criminal. The government deals

with this evil in the only practical way it can do so, namely, by prohibiting the means through which the individual secures the beverage, which is injurious to the purchaser and ultimately to society itself.

The Supreme Court of Iowa said, *Our House vs. State*, 4 Freem, Iowa, 172:

“The statute is intended as a great public benefit. It seeks to abolish a general and growing evil which is having a most degrading effect upon the moral and physical condition of our race. It seeks to keep men from the common use of these intoxicating and poisonous beverages which so frequently lead to ruin of property, character and health and are proved to be the leading incentive to crime. It seeks to promote the general welfare by prohibiting an excessive vice which is doing more to disqualify men for self government than all other influences combined.”

The court construed the purpose of the law correctly in this case. It was to prevent the common use of intoxicating liquor although the law only prohibited the sale of liquor, or the place where the liquor was sold.

This alleged right of a citizen to secure or buy liquor is not sustained by court decisions or constitutional provision. As the Supreme Court of Illinois said in *Godard vs. Jacksonville*, 15 Ill., 589:

“When we defend the sale of liquor for the sake of tippling, we surely draw our arguments from our appetites, not our reasoning, observations and experience.”

In Kentucky because of certain provisions in their state constitution the Court of Appeals have held that there is a constitutional right in that state to possess liquor for one's own use. We have set forth the reasons in the brief in case No. 271 why the Court of Appeals have not construed their Constitution correctly. Grant-

ing for the moment that they have construed it correctly, it sheds no light upon the situation in a state like West Virginia which has no limitation in its Constitution and which prohibits in the Constitution itself the manufacture and sale of intoxicating liquor for beverage purposes. The power to enact this legislation prohibiting the liquor traffic carries with it the power to enact legislation to make it effective.

State vs. Frederickson, 101 Me., p. 37.

Feibelman vs. State, 310 Ala., 132.

Pennell vs. State, 123 N. W. Rep., —.

State vs. Walder, 83 O. S., 68.

In addition to the above authority, there is ample justification for the enactment of the state law in question in the police power of the State of West Virginia. There has been no limitation placed upon this power by the Constitution of that state. Any law which protects the public health and the public morals is not in contravention with the specific provision of the Constitution of that state, or the United States, is valid.

The law which makes the place of delivery the place of sale is a reasonable exercise of the police power. It is a much needed if not necessary police regulation to deal effectively with the outlawed liquor traffic. The courts of the different states and of the United States have decided that the liquor traffic is fraught with so much of evil and misery to society, it has no inherent right to exist. If this be true of a traffic which has not been outlawed, how much more so should it be of an outlawed traffic. Certainly the government should not lend its aid in protecting a traffic which the legislative power of the state or the nation has prohibited.

The United States Circuit Court of Appeals, Vol. 219, p. 794, summed up the situation on this point as follows:

"There is nothing in the amendment of the State Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits 'the manufacture, sale and keeping for sale' of liquors, but it does not indicate a purpose to deprive the legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquor, had in view the general common law rule and the sale was to be made considered made out of the state on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the state as a permanent state policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the Constitution as a permanent law of the state. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in *State vs. Hooker* (Okla.), 98 Pac., 964."

### **IS THE WEBB-KENYON LAW CONSTITUTIONAL?**

The vital question in this case is, Has Congress power under the Constitution to enact such legislation as is now under consideration?

It is well at the outset of this investigation to inquire what power over commerce Congress has vested in it by the Constitution, and to what extent the courts have said this power goes. The sole provision of the Constitution prescribing a rule relative to interstate commerce is that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."



This clause has been before the Supreme Court many times and we have not been able to find where the court has placed any limit upon it. ~~In the early case, Gibbons vs. Ogden, 9 Wheat., 1, 6 L. Ed., 71, Chief Justice Marshall, speaking for the court, said:~~ 188 U.S. 256

"In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the constitution itself. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry, or cause to be carried, from one state to another, that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law."

In *Buttsfield v. Stranahan*, 192 U. S., 470; 48 L. Ed., 525, the court said:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than prescribed in the constitution."

In the *Rehrer* case, 140 U. S., 545; 35 L. Ed., 572, the court in passing upon the *Wilson Act*, said on this subject:

"The Constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint."

In the Northern Securities case, 193 U. S., 34; 48 L. Ed., 679, it is said:

“By express words of the Constitution, Congress has power ‘to regulate commerce with foreign nations and among the several states and with the Indian tribes.’ In view of the numerous decisions of the court, there ought not at this day, be any doubt as to the scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition.”

The latest pronouncement is in the opinion of the court in the “White Slave” case, *Hoke vs. United States*, 227 U. S., 308; 57 L. Ed., —, 43 L. R. A. (N. S.), 906. In this opinion, the court, speaking through Mr. Justice McKenna, says:

“By express words of the Constitution, Congress has power ‘to regulate commerce with foreign nations and among the several states and among the Indian tribes.’ In view of the numerous decisions of this court, there ought not, at this day, to be any doubt as to the scope of such power. In some circumstances, regulation may properly take the form and have the effect of prohibition.”

In *Frisbie vs. U. S.*, 157 U. S., 160; 39 L. Ed., 657, the court held that the law forbidding the taking of more than \$10.00 compensation for prosecuting a pension claim is not unconstitutional in that it interfered with the price of labor and the freedom of contract, because the whole subject of pensions and the regulations as to their prosecution is within the control of Congress.

If Congress has entire power in the regulation of commerce between the several states, it is difficult to see why it can not enact the law under consideration in the case at bar.

All regulation involves partial and limited prohibition, and the Supreme Court of the United States has repeat-

edly upheld regulations of interstate trade which involve partial and limited prohibitions of such trade. *Wilkerson vs. Rehner*, 140 U. S., 545; 35 L. Ed., 572; *Champion vs. Ames* (Lottery Case), 188 U. S., 321; 47 L. Ed., 492; *Northern Securities Co. vs. United States*, 193 U. S., 197; 48 L. Ed., 679; *St. Louis vs. Western U. Tel. Co.*, 149 U. S., 465; 37 L. Ed., 810; *N. Y., N. H. & H. R. Co. vs. Interstate Commerce Commission*, 200 U. S., 361; 50 L. Ed., 515.

The power to regulate commerce between the several states is given in the same words of the Constitution which confer power to regulate commerce with foreign nations and with Indian tribes; and it has been held again and again that, with respect to the other two forms of commerce, the power to regulate implies the power absolutely to prohibit, in the discretion of Congress. *U. S. vs. Holliday*, 3 Wall., 407; 18 L. Ed., 182; *U. S. vs. Mari-gold*, 9 How., 560; 13 L. Ed., 257, 260; *U. S. vs. 43 Gallons of Whiskey*, 93 U. S., 188, -96; 23 L. Ed., 846, 847; *U. S. vs. Le Bris*, 121 U. S., 279; 30 L. Ed., 946; *Buttsfield vs. Stranahan*, 192 U. S., 470; 48 L. Ed., 525.

We have already said that the power to regulate interstate commerce is vested solely in Congress, "is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution itself." *Champion vs. Ames*, *supra*.

The Wilson act of 1890, providing that intoxicating liquors transported into any state or territory should upon arrival therein be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, was legislation strikingly analogous in principle to the Webb-Kenyon law. Prior to the enactment of the Wilson Act the case *Leisey vs. Hardin*,

135 U. S., 108; 34 L. Ed., 132, had held that an affirmative action by Congress, permitting the same is necessary before a state is free to exercise its police powers relative to an article of interstate commerce. In that case there is a recognition of the determining power of Congress whether interstate commerce shall be free or shall be subject to restriction.

In the last cited case the court says:

"And while by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

As the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states can not exercise that power without the assent of Congress.

"It is not for Congress to determine what measures a state may properly adopt as appropriate and needful for the protection of public morals, the public health or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

In speaking of the mingling of the imported article with the common mass of property in the state, the court continues:

"Up to that point of time, we hold that in the absence of congressional permission to do so, the

state had no power to interfere by seizure, or any other action in prohibition of importation and sale by the foreign and non-resident importer."

Again, in recognizing the power of Congress absolutely over interstate commerce, the court says:

"To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states."

The same objection is raised to the Webb-Kenyon law which was urged against the Wilson Act. The objection resolves itself into this: Can Congress by appropriate legislation remove the impediment now existing which interferes with the full exercise by the state of their police powers?

The Wilson Act made all intoxicating liquors subject to the laws of the states upon "arrival." This, the Supreme Court, in *Rhodes vs. Iowa*, 170 U. S., 412; 42 L. Ed., 1088, very properly construed to mean when the same had come into the hands of the consignee. In the *Rehrer* case, 140 U. S., 545; 35 L. Ed., 572, the court, in recognizing the necessity for congressional action to remove the impediment imposed by the interstate commerce law and allowing the police powers of the state to attach to intoxicating liquors upon their arrival in the state, said:

"By the adoption of the Constitution the ability of the several states to act upon the matter solely in accordance with their own will was extinguished and the legislative will of the General Government substituted. \* \* \*

"But this furnishes no support to the position that Congress could not, in the exercise of the discretion

reposed in it, concluding that the common interest did not require entire freedom in the traffic in ardent spirits, enact the law in question. In doing so, Congress has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule whose uniformity is not affected by the 'variations in state laws dealing with such property—

“No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so. \* \* \*”

In *U. S. vs. Holliday*, 3 Wall, 409; 18 L. Ed., 182, we find a striking illustration, as well as a valuable precedent showing the extent of the powers of congress over “commerce with foreign nations” and among the several states and with the Indian tribes.” The Holliday case arose as follows: Holliday was indicted in Gratiot county, Michigan, for selling liquor to an Indian in charge of an agent. The county was not Indian county, nor did it even have an Indian reservation in it. It was contended that the sale of liquor to an Indian or to any other person within the county was a matter of state policy, for the state to decide for itself with which Congress had nothing to do. The court, however, held that the power of Congress was broad enough to cover the act thus assailed. Here the Supreme court upheld the validity of a statute which absolutely prohibited the sale of intoxicants to Indians as a valid exercise of the constitutional power now under discussion.

In *Hoke vs. U. S.*, 227 U. S., 308; 57 L. Ed., —; 43 L. R. A. (N. S.), 906, the white slave act was under consid-

eration and was assailed as being unconstitutional in that it conflicts with the reserved police powers of the states to punish prostitution and immorality. In discussing this assignment of error, the court say:

“Plaintiffs in error admit that the states may control the immoralities of its citizens. Indeed this is their chief insistence; and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police powers of the states to regulate the morals of their citizens, and asserts that it is in consequence an invasion of the reversed powers of the states. There is unquestionably a control in the states over the morals of their citizens, and it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states can not reach and over which congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.”

The above quotation illustrates the intent of Congress in passing the Webb-Kenyon act, as well as the subterfuges of those who opposed this kind of legislation. In the act under review, Congress does what the “states cannot;” that is, removes the interstate commerce bar to the free exercise of its police powers by the state.

### **CONGRESS HAS POWER TO PROHIBIT INTER-STATE COMMERCE IN DELETERIOUS COMMODITIES.**

It is a well settled proposition of law that Congress has power to eliminate from interstate commerce all deleterious commodities, or acts.

Champion vs. Ames, 88 U. S., 356.

Hoke vs. State, 227 U. S., 309.



That intoxicating liquor is a deleterious commodity,  
 See *Crowley vs. Christensen*, 137 U. S., 86.  
*Mugler vs. Kansas*, 123 U. S., 623.

**POWER TO PROHIBIT THE TRAFFIC FROM INTERSTATE COMMERCE INCLUDES AUTHORITY TO DO LESS.**

"Whenever a state has authority to entirely prohibit the sale or use of any commodity, it carries with it the power to do less than that which it is authorized." *Ripley vs. Texas*, 193 U. S., 504. "It is a question of the power of the state as a whole." *Mo. vs. Dockery*, 101 U. S., 165. "But the state has power to prohibit the sale of intoxicating liquor altogether, if it sees fit." *Mugler vs. Kansas*, 123 U. S., 623. "That being so, it has power to prohibit it conditionally. It is true the greater does not always include the less \* \* but in general the rule holds good, it does here." /94/ U.S. 445

Congress has the power over interstate commerce that the state has over the liquor traffic. It is admitted that Congress may prohibit entirely interstate commerce in intoxicating liquor. That being true, it has a right to do less than entirely prohibit. Congress has drawn the line on interstate shipments of liquor in violation of the state law. Such a limitation upon interstate commerce is founded on good reason and enlightened conscience.

*State vs. U. S. Express Co.*, 145 N. W., 458.

*State vs. Doe*, 139 Pac., 1170.

*American Express Co. vs. Beer*, 65 Sou., 581.

*Southern Express Co. vs. State*, 66 Southern, 122.

*Columbia Law Review* vol 14 no 4-121

In the case of *U. S. vs. Marigold*, 9 Howard, 560, Justice Daniel in speaking for the court said:

"Under the commerce clause, every subject within the legitimate sphere of commercial regulation may be partially or wholly excluded. The power of ex-

clusion may operate on any and every subject of commerce to which the legislative expression may apply."

Under this authority it is clear that Congress, whose power is plenary, may regulate interstate traffic in intoxicating liquors to the extent that such traffic shall not embarrass and hinder the state in the exercise of its police powers.

It is true the restriction or the limitation in the Webb-Kenyon law does not go as far as Congress was authorized to go, but as Justice Daniel said, "every subject within the legislative sphere of commercial regulation may be partially or wholly excluded."

#### **POWER TO PROHIBIT ARTICLES FROM INTER-STATE COMMERCE ILLUSTRATED.**

The power of Congress to regulate interstate commerce as provided in Article 1, Section 8, Clauses 3 and 18, is illustrated by the enactment of many laws which prohibit entirely or partially certain acts. The shipment and sale of intoxicating liquors to the Indians is prohibited. *U. S. vs. 43 Gallons of Whiskey*, 93 U. S., 188.

The interstate transportation of infected cattle is prohibited. *Reed vs. Colorado*, 189 U. S., 137.

Congress has power to prohibit the importation of goods from foreign countries. *Southern Securities Litigation* 193 U. S., 334.

Adulterated or misbranded foods are prohibited as subject matters of interstate commerce. *Hippolite Egg Co. vs. U. S.*, 220 U. S., 45.

Obscene literature is prohibited from interstate commerce. *U. S. vs. Popper*, 98 Fed., 423.

29

## CONGRESS HAS POWER TO ENACT THE LAW IN QUESTION AS A POLICE REGULATION.

Congress has authority to enact certain legislation having the quality of police regulations. The states have such power beyond the peradventure of a doubt. Congress has such power in certain instances and especially in the enactment of interstate commerce law, because the states delegated police power to Congress to act on this subject.

In the *Rehrer* case, 140 U. S., 345, it was said in sustaining the *Wilson* act, that is was:

“Enacted in the exercise of its police powers and is constitutional and valid.”

The lottery case above referred to holds that the *Wilson* act was sustained in the *Rahrer* case:

“As a valid exercise of the power of Congress to regulate commerce among the states.”

In the *Addyson* case (175 U. S., 211), the power of Congress is affirmed to regulate interstate commerce to any substantial extent. In the lottery case the power to regulate is put to the essential test whether the legislation is for the purpose of guarding the morals of the people of the nation or involves that purpose.

In *Phalens* case (8 How., 161, 168), it is observed “that the suppression of nuisances, injurious to the public health or morality, is among the most important duties of the government.”

In the case of *Hoke v. State*, 227 U. S., 309: Syllabus:

“Congress may adopt not only the necessary, but the convenient means necessary to exercise its power

over a subject completely within its power, and such means may have the quality of police regulation."

The law in question is not only a convenient but a necessary means for the enforcement of the law against a traffic which the Supreme Court in the 137 U. S., 86, characterized as "a source of crime and misery to society."

**THERE IS THE SAME REASON FOR SUSTAINING  
A LAW TO ELIMINATE OR RESTRICT SHIP-  
MENTS OF LIQUOR BY INTERSTATE COM-  
MERCE THAT THERE IS FOR SUSTAINING A  
LAW PROHIBITING INTERSTATE TRAFFIC  
IN LOTTERY TICKETS.**

In deciding the case of *Champion vs. Ames*, 188 U. S., 356, the Supreme Court held:

"It would not permit the declared policy of the state which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce."

The lottery business was considered by the people in many of the states a recognized evil and prohibited, just as the liquor traffic is prohibited now in many of the states. Those who wanted to make money out of the sale of lottery tickets resorted to the express companies and the U. S. mails to carry on a business which had been outlawed in the states. The courts properly held that the states had a right to protect the public morals of their citizens, and that interstate commerce could not be used as an agency to overthrow or disregard the policies of the states.

The evil complained of at the time this decision was rendered was no more far reaching, or dangerous to the public than the liquor traffic is today. On pages 45 to 57 of the brief filed in case No. 271, we have cited a few of the many authorities which are available to show the inherent evil effect of the consumption of intoxicating liquor and the decisions of the courts concerning it.

The Supreme Court of Iowa in the case of *Santo vs. State*, 2 Iowa, 165, said:

“That the use of intoxicating liquor as a drink is the cause of more want, pauperism, suffering and crime and public expense than any other cause and perhaps than all other causes combined.”

The court did not say that the sale of liquor was the cause of more want and pauperism, but the use of liquor was the cause of want, pauperism, crime and public expense. The statute prevented the use of liquor although its provisions applied only to the sale and keeping of a place where liquor was sold. Comparisons, of course, are difficult to make accurately but in view of the present tendency in our country and in foreign nations to try and eliminate this great evil, it is certainly within the bounds of a conservative statement to say that the lottery business was no greater evil when it was entirely eliminated from interstate commerce than the liquor traffic is today.

### **THE LAW IS NOT A DELEGATION OF LEGISLATIVE POWER.**

The law in question does not attempt to delegate legislative power to the states. It simply removes an impediment to the enforcement of a law enacted by the states under its police power.

The Supreme Court of Iowa in the *State vs. U. S. Express Co.*, 145 N. W. Rep., 451, has rendered a very able

opinion on this question. An extended quotation from this decision will be found on pages 61 to 65 of brief in case No. 271.

### CASES CITED BY APPELLANT.

Appellant cites on pages 39, 50, 51 and 52 of their brief the case of Van Winkle vs. State as authority for the proposition that the Webb-Kenyon law does not authorize the application of a state statute to an interstate shipment for personal use. The substance of Judge Wooley's opinion is set forth in very prominent type on page 52 as follows:

"There is thus presented a case of the shipment of liquor for lawful purposes, in violation of a state statute prohibiting the shipment of liquor for any purpose, enacted under authority of the federal statute prohibiting the shipment of liquor for an unlawful purpose."

The fallacy in this statement is in construing the meaning of the Webb-Kenyon Act. Judge Woolley assumes that the Webb-Kenyon law applies only to shipments of liquor which are used by the consignee in violation of law. The law itself says:

"The shipment or transportation in any manner by any means whatsoever of \* \* \* intoxicating liquor from one state \* \* \* to another state \* \* \* **which said \* \* \* intoxicating liquor is intended by any person interested therein to be received, possessed or in any manner used in violation of any law of such state is hereby prohibited.**"

The decision of the Delaware court entirely ignores the ordinary meaning of the words "by any person interested therein to be received, possessed," etc. The Webb law is broader than the construction placed upon it by

Judge Woolley. It prohibits the shipment of liquor from one state into another state when such liquor is intended by any person interested therein to be received, or possessed in violation of law. If the state desires to make the receipt, or delivery of intoxicating liquor in a state a violation of law, it comes clearly within the language of the Webb-Kenyon Act.

The basis of the error in this decision is the assumption that these laws prohibiting the sale, shipment, etc., of intoxicating liquor were not intended to prevent the use of liquor to the extent covered by the law. We have discussed on pages 20 to 29, in brief No. 271, this whole proposition as to the right of the individual to secure or possess liquor for his own personal use.

We submit that the decision of the General Sessions Court in this case of *State vs. VanWinkle*, 88 Atl., 807, represents the better reasoning. Likewise *State vs. Grier*, 88 Atl., 579; *Express Co. vs. Beer*, 65 Southern, 115; *Atkinson vs. Express Co.*, 48 L. R. A. (N. S.), 349.

### **QUOTATIONS FROM RECORDS.**

The quotations on pages 41 to 43 of the brief for the Adams Express Co., containing statements by members of Congress in reference to the meaning of the Webb-Kenyon Law, even if they could be looked to, do not support the conclusion which said brief seeks to draw therefrom. The contention no doubt was that the Webb-Kenyon law by its own terms prohibited shipment of liquor for a citizen's own use, and hence the opponents of the bill were seeking to prevent its enactment. It was perfectly correct to say that no such effect could be given to the bill and that the result would depend upon the



character of statutes that the states might enact. If anybody says that the act was to be confined simply to shipments of liquor for sale, it is so manifestly erroneous in view of the expressed terms of the act, that no regard could be given to such statements. The act by its terms plainly includes "receipt, possession, sale, or other use, of liquors in violation of a state law." For instance, this view is well expressed in Mr. Rottenberry's statement, page 43 of the brief, "it does not interfere with the shipment or reception of liquors for lawful consumption or for any purpose not prohibited by state law."

Senator Kenyon also said practically the same thing, page 43, of brief: "If liquors are shipped with the intent of being used by the person for his own personal use and in no way to violate the law of the state, then they are subjects of commerce."

He meant simply that Congress was not constructing a law which by its own force, contrary to the wishes of the state, would prevent personal use or shipment for personal use.

And Senator Paynter, page 44 of brief of appellant, was correct in saying that the bill itself would not stop the purchase of liquor for personal use, but that was quite a different thing from saying that no statute could prevent the purchase or shipment of liquor for personal use. If a state law should be enacted and it should be held to be valid by the state courts, the Webb-Kenyon bill would authorize the enforcement of such state statute, and would exclude shipment of such liquor intended to violate said state statute.

Appellant's brief cites cases from Tennessee, South Carolina, Delaware and Texas, and also the Alabama case of Southern Express Co. vs. State, 66 Sou. Rep., 115, as

alleged authority for his contention that the Webb-Kenyon law does not authorize the application of a state statute to an interstate shipment for personal use; but, we respectfully submit that the cases have no application, because they did not involve the validity of any state law prohibiting the possession or receipt of liquor for personal use.

Of course, it is true that if under the state law an interstate shipment is lawful, then the Webb-Kenyon law does not apply; but this is far from saying that it would not apply if the possession and receipt of liquor by the state law was prohibited.

Appellant's brief asserts in respect to the Alabama case on page 58 as follows:

"The court holds that no law of the state of Alabama prevents or can under the Webb-Kenyon law prevent the delivery by a carrier of liquors intended for personal use."

This is a gross error of fact. At that time, there was no law in the state of Alabama preventing, or seeking to prevent or restrict the delivery by carriers of liquor intended for personal use. Hence no question arose as to whether the state could enact a law containing such restriction or provision, and the court did not undertake to anticipate what the legislature might do in the future. There is nothing whatever in the opinion to justify the statement that the court held the legislature could not enact a restrictive law upon that subject.

In connection with the cases from North Carolina cited in appellant's brief, see also the following:

State vs. S. A. L. Ry., N. C. 84, S. E. 283.

The Tennessee case of Palmer vs. Southern Express Co., 165 S. W., 236, did not involve any state law pur-

porting to prohibit the acceptance or possession of liquor for personal use. On the contrary the court showed that by the statutes of Tennessee, a citizen had the right to purchase liquor for his own use and that of his family, and indeed the court said that such purchase for personal use was permitted by the statute in question, meaning thereby the statute under consideration providing for the quantity that might be shipped at one time, and which was the statute assailed as unconstitutional in the pending case. There is an extract from this opinion on page 35 of appellant's brief, the last sentence of the quoted extract stating that "this was a lawful use and indeed permitted by the statute in question," refers not to the Webb-Kenyon act, but to the Tennessee act.

There is another phase of the statute which the Tennessee court emphasized, and that is that although there was a limitation as to the quantity of a single shipment, there was no limitation as to the number of shipments, and hence under the Tennessee statutes, the citizen could secure an unlimited quantity of liquor for his personal use by repeating his orders for shipment. Hence, the court said, that the statute in fixing the quantity of one shipment was but a regulation of commerce. Whether this was correct, we need not inquire, although the Mississippi Court in *American Express Co. vs. Beer*, 65 Sou., 575, seems to have reached the opposite conclusion. The Tennessee case is no authority, that even in Tennessee the legislature might not enact a statute that would restrict the quantity that might be received by a citizen for his own use or be possessed by him for his own use.

## **PRESUMPTIONS AS TO CONSTITUTIONALITY.**

Statutes are always presumed to be constitutional and this presumption will be indulged in by the courts until the contrary is clearly shown.

In *United States vs. Gettysburg Elec. R. Co.*, 160 U. S., 668; 40 L. Ed., 576, the court speaking through Mr. Justice Peckham said:

“In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.”

In *Brown vs. Walker*, 161 U. S., 590; 40 L. Ed., 819, Justice Brown, speaking for the court, says:

“That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not hold the law invalid, unless, as was observed by Mr. Chief Justice Marshall in *Fletcher vs. Peck*, 10 U. S., 88; 3 L. Ed., 162, the ‘opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.’ ”

In *A. T. & S. F. R. Co. vs. Matthews*, 174 U. S., 96, 43 L. Ed., 909, Mr. Justice McKenna said:

“It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and

with the purposes of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it transcended its powers."

In *United States vs. Harris*, 106 U. S., 635; 27 L. Ed., 290, Mr. Justice Woods, speaking for the court, said:

"Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

**THE DECISIONS OF STATE SUPREME COURTS  
AND UNITED STATES COURT OF APPEAL  
HAVE UNIFORMLY SUSTAINED THE CON-  
STITUTIONALITY OF THE WEBB-KENYON  
ACT.**

Every state Supreme Court which has passed upon the constitutionality of the Webb-Kenyon law has sustained it. The reasoning of the courts in sustaining this law has varied somewhat due to the legislation which was involved in the case. In many of these states there was no law making the place of delivery the place of sale, nor the receipt of liquor or possession of it unlawful. Consequently, the exact question involved in this hearing was not before the court. The cases which have sustained the constitutionality of the law are as follows:

*State of West Virginia vs. Adams Express Co.*, Fed. Rep. No. 4, Vol. 219, April 1, 1915, page 794; *American Express Co. vs. Beer* (Miss.), 65 So., 115; *Ex Parte Peede* (Texas), 170 S. W., 749; *Van Winkle vs. State* (Del.), 91 Atl., 385; *State vs. Oregon R. & N. Co.*, 210 Fed., 378; *State vs. Express Co.* (Ind.),

145 N. W., 451; *State vs. Doe* (Kas.), 139 Pac., 1169; *Palmer vs. Express Co.* (Tenn.), 165 S. W., 236.

The case which meets squarely and conclusively the questions raised in this hearing, is *West Virginia vs. Adams Express Co.*, Fed. Rep., Vol. 219, p. 785. Every point raised by appellant is squarely answered by that decision (quoted on pages 74 to 83 in brief in case 271).

We submit also for the consideration of the Court the concurring opinion of Justice Clark in *State vs. Cardwell*, 81 S. E. Rep., 632 (see pages 84 to 86 in brief in case 271). These decisions, and others which we have cited, are good authority for these two propositions:

First. The state has authority to enact a law making the place of delivery the place of sale.

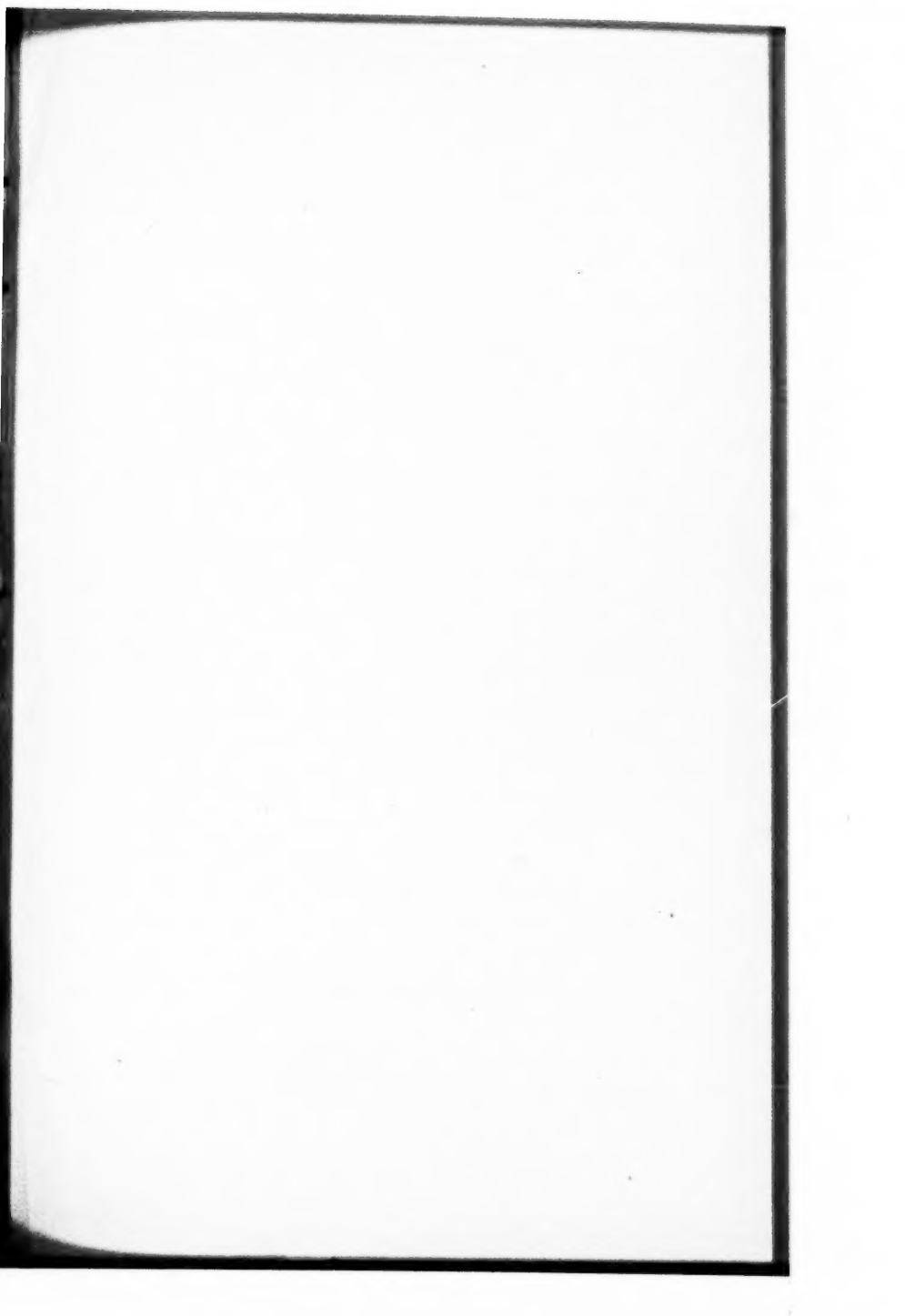
Second. The Webb-Kenyon Law is constitutional.

This is a case of vast importance to the people of the United States.

A majority of the people now live in territory where the liquor traffic is prohibited. They will be prevented from enjoying the benefits of the laws which they have adopted if this law is declared invalid.

We respectfully submit that this law "founded on deep reason and enlightened public policy" should be sustained and the writ of error denied.

W. B. Wheeler,  
Of Counsel for the State of West Virginia.





**No. 857.**

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**SUPREME COURT OF THE UNITED STATES.**

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**October Term, 1914.**

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The James Clark Distilling Company, Appellant,  
vs.  
The Western Maryland Railway Company and the  
State of West Virginia.

---

**Appeal from the District Court of the United States  
for the District of Maryland.**

---

**BRIEF FOR APPELLANT.**

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**Statement of the Case.**

This case differs in no material respect from The James Clark Distilling Company, Appellant, vs. The American Express Company and the State of West Virginia, No. 858, this term. The history of the cases throughout is the same. For that reason we shall content ourselves with a brief statement of the present case, referring to our brief in No. 858 for a full discussion.

Plaintiff, The James Clark Distilling Company, filed separate bills in equity in the court below against The Western Maryland Railway Company (the present case), and The American Express Company (No. 858), to compel the carriage by the companies, of its product from Cumberland, Maryland, to consignees in West Virginia.

The bill in this case (R. 1) charges that defendant, a carrier engaged in interstate commerce, has refused to accept from plaintiff at its place of business in Cumberland, Maryland, shipments of intoxicating liquors purchased from plaintiff at Cumberland, for transportation and delivery to the purchasers at stations on defendant's line in Grant, Tucker and Mineral Counties, West Virginia. It is alleged that the shipments made and to be made by plaintiff were and are intended for the personal use of the consignees and not for illegal sale or other illegal use. That the only reason given by defendant for its refusal to carry and deliver such shipments was that it had been enjoined by the circuit court of Tucker County, West Virginia, from delivering liquors except on conditions so burdensome as to make the delivery impossible. It is charged that said injunction furnished no legal excuse for defendant's refusal to transport plaintiff's product in interstate commerce.

The bill shows that defendant's continued refusal to transport plaintiff's product constitutes an irreparable injury to plaintiff's business, involving more

than the jurisdictional amount of \$3,000.00, for which plaintiff has no adequate remedy at law; and constitutes a violation of sections 1 and 3 of the Act to Regulate Commerce, by subjecting plaintiff to undue and unreasonable discrimination.

The answer (R. 10) admits the material allegations of fact contained in the bill, but refers to certain provisions of the statutes of West Virginia and to the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law, as justifying its refusal to accept the particular shipment mentioned in the bill and other shipments from plaintiff to consignees in Grant, Tucker and Mineral Counties, West Virginia.

In paragraph 9 the answer further states in effect that on or about the 10th day of August, 1914, the state of West Virginia, by Fred O. Blue, State Commissioner of Prohibition, filed a bill in equity against defendant in the Circuit Court of Tucker County, West Virginia, before a judge having jurisdiction throughout the counties of Mineral, Grant and Tucker, based upon the act of the legislature of West Virginia above referred to and upon the acts of Congress known as the Wilson Act and the Webb-Kenyon Act of March 1, 1913, praying for an order restraining defendant from shipping any liquors from Maryland into said three counties in West Virginia, except upon compliance with certain specified requirements. The answer then sets forth the terms of the injunction issued against defendant by the Circuit Court of Tucker County, and attaches a

copy of said bill of complaint of the state of West Virginia, and of said order of injunction as Exhibits No. 1 and 2 to the answer. The answer alleges that defendant, under said injunction, cannot, as a practical matter, transport any liquors in interstate commerce from the state of Maryland to said three counties in West Virginia because said injunction requires defendant, in connection with the transportation of said liquors, to comply with conditions which are physically and financially impossible; especially in that said injunction requires defendant before accepting any such interstate shipments of liquor for transportation, to first ascertain by acting in good faith, and with due diligence and caution, that such liquors offered for shipment were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignor and without the intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of West Virginia; and in that said injunction forbids defendant from delivering any such liquors when the same have been procured by the consignee for himself and others associated with him to be received or kept for the purpose of use or gift as a beverage or for any distribution or division among the consignee and those associating with him, etc.

Paragraph 11 alleges that in order to continue the transportation of liquors in compliance with said injunction, defendant would be required to main-

tain a force of detectives and investigators at an intolerable expense, for the purpose of ascertaining the intentions of the consignees in respect to the use of such liquors. The answer therefore states that so long as said injunction is in force defendant will continue to refuse all said shipments whether or not they are claimed to be lawful under the laws of West Virginia and the federal law, and that defendant has so notified plaintiff and others offering such shipments.

The evidence shows that the injunction was issued in vacation, ex parte; that the railroad company filed no answer and no motion to dissolve, but upon the issuance of the injunction did not attempt to carry shipments in accordance with its terms, but abandoned the business entirely (R. 41).

The state of West Virginia filed an intervening petition (R. 29) and was made a party (R. 32); relying upon the provisions of the state statute, the Wilson Law and the Webb-Kenyon Law, the petition set forth the proceedings instituted in the circuit court of Tucker County against the railroad company (R. 18), and prayed that the relief sought by plaintiff to establish its right to ship in interstate commerce for personal use be denied.

The transcript of evidence (R. 33) shows that this case and No. 858 were heard as one case. Certain exhibits to testimony printed in this record are not duplicated in the record in No. 858 but are referred to.

Appellee, the State of West Virginia, contended in the court below that the railroad company could not

legally deliver interstate shipments of liquor to consignees in West Virginia for their personal use, because by the law of West Virginia such delivery constituted an illegal sale at the place of delivery. The lower court, after rejecting this contention (R. 48, 50), adopted it by its final decree in deference to the opinion of the Circuit Court of Appeals for the Fourth Circuit in *State of West Virginia vs. Adams Express Company*, 219 Fed. 794 (R. 53). By objections incorporated into the decree (R. 52) and by the assignments of error we contended and contend here, that the court below improperly construed the West Virginia law and the Webb-Kenyon Law, and that the construction given them renders them unconstitutional under the commerce clause of the Constitution of the United States.

For the convenience of the court we have bound with this brief a pamphlet containing the Prohibition Amendment and the Prohibition Law of West Virginia, together with certain regulations and interpretations thereof, issued by the State Tax Commissioner, who is by the law **ex officio** State Commissioner of Prohibition.

For the reasons set forth in our brief in No. 858 we respectfully submit that the decree be reversed.

Lawrence Maxwell,  
Joseph S. Graydon,  
Walter C. Capper,  
J. Phillip Roman,  
Counsel for Appellant.







# Prohibition Amendment

AND THE

# Prohibition Law

OF

WEST VIRGINIA



Rules, Regulations, Forms and Interpretations



EFFECTIVE JULY 1, 1914



Copies hereof may be had upon application to the  
office of State Tax Commissioner  
Charleston, West Va.

TRIBUNE PRINTING CO., CHARLESTON, W. VA.



## CONTENTS.

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Prohibition Amendment.....	4
Webb-Kenyon Law.....	4
Postal Regulations.....	4-5
State Prohibition Law.....	5-17
Interpretations.....	17-22
Forms—Retail Druggists.....	22-23
Physicians' Prescription.....	24
Justices of Peace.....	25-32
Rules and Regulations.....	32-34
Digest of Prohibition Law.....	34-43

### FOREWORD.

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This pamphlet is issued for the purpose of aiding those interested in, or connected with, the enforcement of the prohibition amendment and the prohibition law of the State.

It is recognized that many questions will arise not touched upon in this pamphlet. In respect to such questions correspondence is invited.

The general subjects, as classified herein, are set forth in the table of contents, to which attention is now here directed.

*Fred. O. Blue*

State Tax Commissioner.

Charleston, West Virginia,  
February 17, 1914.

Amendment of Section 46, Article 6 of the State Constitution, ratified by vote of the people at general election held in the month of November, 1912, known as the

### **PROHIBITION AMENDMENT.**

"Sec. 46. On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

An Act of Congress of the United States known as the

### **WEBB-KENYON LAW.**

"An Act divesting intoxicating liquors of their interstate character in certain cases."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

### **POSTAL REGULATIONS—PARCELS POST.**

The regulations of the United States Postal Department prohibit the shipment of intoxicating liquors by mail;—the language of the rule being as follows:

"There shall be prohibited from the mails all spirituous, vinous, fermented or other intoxicating liquors of any kind".—Section 16, paragraph 2, Parcels Post Regulations.

Chapter 13, Acts of the Legislature of 1913, known as the

## STATE PROHIBITION LAW.

(House Bill No. 8 by Mr. Yost.)

AN ACT to prohibit the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except the manufacture, sale and keeping for sale for medicinal, pharmaceutical, mechanical, sacramental or scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes as regulated and provided for by this act; and to enforce the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve; and making the state tax commissioner *ex officio* state commissioner of prohibition, and defining his duties; and providing for the enforcement of this act and prescribing penalties for violations thereof.

(Passed February 11, 1913. In effect July 1, 1914. Approved by the Governor February 17, 1913.)

### SEC.

1. Word liquors construed.
2. Manufacture, sale, etc., of liquors forever prohibited; except.
3. Penalty for violation; when a misdemeanor; when a felony; form of indictment deemed sufficient.
4. Exceptions, druggists; physicians; prescription; affidavit; penalty for giving to persons of intemperate habits; form of indictment against druggist.
5. Person of intemperate habits or other person use other than stated in affidavit; penalty; if physician of intemperate habits—or without making examination, penalty.
6. Persons assisting in maintaining club house, etc., where liquor is received or kept, sold, given away or divided, penalty.
7. Keeping or giving away.
8. Advertise.
9. Justice of the peace, courts, mayor shall issue warrant, when.
10. Probable cause.
11. When liquors are seized, *prima facie* evidence shall be publicly destroyed.

### SEC.

12. Officers may break open house, when.
13. Payment of United States tax *prima facie* evidence of guilt.
14. Nuisance, who guilty.
15. State tax commissioner *ex officio* state commissioner of prohibition.
16. Duty of commissioner.
17. Suit in equity may be instituted; injunction, etc.
18. In addition to penalties, bond may be required.
19. Express and railroad companies, etc., shall keep books and record names of persons to whom liquor is shipped.
20. Who may employ attorney to assist in prosecution.
21. Rewards.
22. State right to appeal.
23. Police powers.
24. Sale by manufacturer and wholesale druggist under supervision of commissioner.
25. Sections inconsistent repealed.
26. In effect, when.

*Be it enacted by the Legislature of West Virginia:*

Sec. 1. The word "liquors" as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word "liquors," as hereinafter used in this act.

Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors manufactured prior to July first, one thousand nine hundred and fourteen, and stored in United States bonded warehouses in the custody of the United States collector of internal revenue, and the said liquors when tax paid and in transit from such warehouses to points outside of this state.

Sec. 3. Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act



as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.

An indictment for any first offense under this section shall be sufficient if in the form or effect following:

State of West Virginia,

County of..... to-wit:

In the Circuit Court of..... County:

The grand jurors in and for the body of the said county of....., upon their oaths do present that A. B., within one year next prior to the finding of this indictment, in the said county of....., did unlawfully manufacture, sell, offer, keep, store and expose for sale and solicit and receive orders for liquors, and absinthe and drink compounded with absinthe, against the peace and dignity of the state.

Sec. 4. The provisions of this act shall not be construed to prevent any one from manufacturing for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal and scientific purposes, or of wine for sacramental purposes, by religious bodies, or any United States pharmacopœia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. But no druggist shall sell any such grain alcohol except for medicinal, scientific, pharmaceutical and mechanical purposes, or wine for sacramental purposes, except as hereinafter provided, and the same shall not be sold by such druggist for medicinal purposes, except upon a written prescription of a physician of good standing in his profession and not of

intemperate habits, or addicted to the use of any narcotic drug, prescribing the amount of alcohol, the disease or malady for which it is prescribed, and how it is to be used, the name of the person for whom prescribed, the number of previous prescriptions given by such physician to such person within the year next preceding the date of such prescription, and stating that the same is absolutely necessary for medicine, and not to be used as a beverage, and that such physician, at the time such prescription was given, made a personal examination of such person, and that such person is known to such physician to be of temperate habits and not addicted to the use of any narcotic drug, and only one sale shall be made upon such prescription, and such prescription shall be at all times kept on file by such druggist and open to the inspection of all state, county, and municipal officers. It shall be the duty of such druggist to register in a book kept for that purpose all prescriptions from physicians mentioned in this section, stating the name of the party for whom prescribed, the date of the prescription, the name of the physician by whom the prescription is issued, the quantity of such alcohol and the use for which prescribed, and such record shall at all times be open to the same inspection as such prescriptions.

It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person, not a minor, and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage, or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit,

and only in the county where the same is made, and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath.

If any druggist, owner of a drug store, registered pharmacist, clerk or employe shall upon such prescription or affidavit, or otherwise, knowingly sell or give any such alcohol or wine to any person who is of intemperate habits or addicted to the use of any narcotic drug, or knowingly sell or give the same to any one to be used for any purpose other than that named in said affidavit or prescription, or who shall sell or give away any liquors without such affidavit or prescription, he shall be deemed guilty of a misdemeanor and punished by fine of not less than one hundred nor more than five hundred dollars and confined in the county jail not less than thirty days nor more than six months. In any prosecution against a druggist, owner of a drug store, registered pharmacist, clerk or employe, for selling or giving liquor contrary to law, if a sale or gift be proven, it shall be presumed that the same was unlawful in the absence of satisfactory proof to the contrary and the presentation of such prescription or affidavit by the defendant at the time of the trial for such sale or gift, shall be sufficient to rebut the presumption arising from the proof of such sale or gift. *Provided*, the jury shall believe, from all the evidence in the case, that such sale or gift was made in good faith under the belief that such prescription or affidavit and statements therein were true; and, *provided, further*, that such druggist, owner of a drug store, registered pharmacist, clerk or employe shall have complied with all other provisions of this act relating to the sale or gift.

An indictment against any druggist, registered pharmacist, clerk or employe, for any offense committed under the provisions of this section, shall be sufficient, if in the form and effect following:

State of West Virginia,

County of....., to-wit:

In the Circuit Court of said County:

The grand jurors in and for the body of said county of.....  
 ....., upon their oaths do present that A. B., within  
 one year next prior to the finding of this indictment, in the said  
 county of....., did unlawfully sell, give, offer,

expose, keep and store for sale and gift, liquors, against the peace and dignity of the state.

Sec. 5. If any person who is of intemperate habits or addicted to the use of any narcotic drug shall make the affidavit mentioned in the preceding section, or if any person making such affidavit shall use as a beverage, or for any purpose, or at any place other than that stated in such affidavit, or shall knowingly permit another to do so, said alcohol or wine, or any part thereof, or shall knowingly make any false statement in such affidavit, he shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred nor more than five hundred dollars, and be confined in the county jail not less than two nor more than six months for the first offense hereunder; and for the second offense he shall be deemed guilty of a felony and punished by confinement in the penitentiary not less than one nor more than five years.

And if any physician who is not in good standing in his profession or who is of intemperate habits, or who is addicted to the use of any narcotic drug, shall issue any such prescription as is mentioned in the last preceding section; or if any physician shall issue such prescription without, at the time, making a personal examination of the person for whom the liquor is prescribed, or shall prescribe for any person who is in the habit of drinking to intoxication and whom he knows, or has reason to believe is in the habit of drinking to intoxication, or shall give such prescription and make the statements therein required, or any part thereof, falsely, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred nor more than five hundred dollars and imprisoned in the county jail not less than thirty days nor more than six months, and in addition thereto, for the first offense under this statute, the court may, in its discretion, suspend the license of such physician for a period of six months and for each offense thereafter the court shall suspend such license for a period of six months.

Sec. 6. Every person who shall directly or indirectly keep or maintain by himself or by associating with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club house, or other place in which any liquor is received or kept for the purpose of use, gift, barter or sold as a beverage, or for distribution or division among the members of any club or association by any means whatsoever; and every person who shall use, barter, sell or give away,

or assist or abet in bartering, selling or giving away any liquors so received or kept, shall be deemed guilty of a misdemeanor and upon conviction thereof be punished by fine of not less than one hundred nor more than five hundred dollars and by imprisonment in the county jail not less than thirty days nor more than six months; and in all cases the members, share-holders or associates in any club or association mentioned in this section, shall be competent witnesses to prove any violations of the provisions of this section, or of this act, or of any fact tending thereto; and no person shall be excused from testifying as to any offense committed by another against any of the provisions of this act by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him.

Sec. 7. The keeping or giving away of intoxicating liquors, or any shifts or devices whatever, to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act.

Sec. 8. If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise for himself or another of the sale or keeping for sale of liquors, or shall circulate or distribute any price-lists, circulars or order blanks advertising liquors or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than five hundred dollars.

Sec. 9. Every justice of the peace and every circuit, criminal or intermediate court, or the judges thereof in vacation, and every mayor of any city, town or village, upon information made under oath or examination that any person is manufacturing, selling, offering, or exposing, keeping or storing for sale or barter, contrary to law, any liquors, or that the affiant has cause to believe and does believe that such liquors so manufactured, sold, offered, kept or stored for sale or barter in any house, building or other place named therein, contrary to the provisions in this act, shall issue his warrant requiring the person suspected to be brought before him for examination, or the said house, building or other place to be searched, and the parties found therein to be arrested and brought before him as aforesaid; and requiring the officer to whom it is directed to summon such witnesses as

shall be therein named, or whose names are endorsed thereon to appear and give evidence on the examination, and in the same warrant shall require the officer to whom it is directed to seize and hold all liquors found therein, also vessels, bar fixtures, screens, glasses, bottles, jugs and other appurtenances apparently used in the sale, keeping or storing of such liquors contrary to law.

Sec. 10. If, upon examination of such person, it shall appear to such justice, court, judge or mayor, that there is probable cause to believe him guilty of the offense charged, the accused shall be required to enter into a recognizance, with sufficient securities, in the sum of not less than five hundred dollars, to appear before the next term of the circuit or criminal or intermediate court of the county having jurisdiction, to answer an indictment if one be preferred against him; and upon his failure to enter into such recognizance, the justice, court, judge or mayor shall commit him to jail to answer such indictment. All material witnesses shall also be recognized, with or without sureties, as such justice, court, judge or mayor may deem proper, to appear before the grand jury at the next term of such court and give evidence against the accused, and such justice, court, judge or mayor shall require the accused to give bond with sufficient security in the sum of five hundred dollars conditioned that he will not violate any of the provisions of this act during the time intervening between the date of such bond and the adjournment of the next grand jury term of said circuit or criminal or intermediate court of the county; and upon his failure to give such bond, the justice, court, judge or mayor shall commit him to jail until such bond is given or until he is discharged therefrom by the circuit or intermediate court of the county.

Sec. 11. Whenever liquors shall be seized in any room, building or place which has been searched under the provisions of this act, the finding of such liquors in such room or of a government license therein shall be *prima facie* evidence of the unlawful selling and keeping and storing for sale of the same by the person, or persons, occupying such premises, or by any person named in any government license posted in such room, or his associates, agents or employes thereunder, and the proprietor or other persons in charge of the premises where such liquor was found, or who is so named in such government license, and his associates, shall be subject to trial by due process of law on the charge of selling or keeping or storing for sale unlawfully such liquor, under the indictment and form prescribed in section three of

this act, and upon his conviction of selling, offering, storing or exposing for sale such liquor unlawfully, the liquor found upon said premises shall at once be publicly destroyed by some responsible person to be appointed by the court.

Sec. 12. If in such house, building or place, as is hereinbefore mentioned, the sale, offering, storing or exposing for sale of liquors is carried on clandestinely, or in such manner that the person so selling, offering, exposing, keeping or storing for sale, cannot be seen or identified by the officer or officers charged with the execution of a warrant issued under sections ten and eleven of this act, any such officer may, whenever it is necessary for the arrest or identification of the person so offending, or the seizing of such liquor, break open and enter such house, building or place.

Sec. 13. The payment of the special tax required of liquor dealers by the United States by any person, or persons other than druggists, within the state, shall be *prima facie* evidence that such person, or persons, are engaged in keeping and selling, offering and exposing for sale, liquors contrary to the laws of this state, and a certificate from the collector of internal revenue, his agents, clerks or deputies, showing the payment of such tax, and the name or names of person to whom issued, and the names of the person or persons, if any, associated with the person to whom such tax receipt is issued, shall be sufficient evidence of the payment of such tax, and of the association of such persons for the selling and keeping, offering and exposing for sale of liquors contrary to the provisions of this act in all trials or legal inquiries.

Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever, as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, build-



ing or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

Sec. 15. The state tax commissioner shall be *ex officio* state commissioner of prohibition. Wherever the word "commissioner" is used in this act, it shall mean and be taken to mean the state commissioner of prohibition.

Sec. 16. It shall be the duty of the commissioner, his deputies and agents, to superintend the enforcement of all provisions of this act, and laws of this state affecting the manufacture, sale, keeping, exposing or offering for sale, or giving or soliciting or receiving orders for liquors, or laws connected in any way with the liquor traffic, to diligently inform themselves of all violations of such laws and either make report thereof to the prosecuting attorney of the proper county, who shall forthwith prosecute the same as provided by law, or said commissioner, his agents or deputies, shall make complaint of any violations of any such laws before the proper court or committing justice, and conduct the prosecution thereof in any court in the state having jurisdiction of such matters; and for the purpose of enforcing such laws, the said commissioner, his agents and deputies, shall have all the powers now vested in the prosecuting attorneys of this state and the attorney general thereof, and of sheriffs, their deputies, and constables and police officers of the state. *Provided*, that nothing in this act shall be construed to take from such prosecuting attorneys or the attorney general, or his assistants, any of the powers now conferred upon them by law, except as herein provided, or to relieve any of the said officers from any duty imposed upon him by any statute of this state.

Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill are true, the court shall order that no liquors shall be sold, bartered, given

away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof, for a period of not to exceed one year in the discretion of the court from and after such finding, in case of a drug store; in other cases the order for abatement shall be perpetual.

Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the empanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein.

Sec. 18. In addition to the penalties prescribed for violation of any of the provisions of sections two to sixteen, inclusive, of this act, the court may in its discretion, when such conviction is had, require the defendant to execute bond with good security to be approved by the court or clerk thereof, in the penalty of one thousand dollars, conditioned not to violate any of the provisions of any of said sections for the term of two years, and in default of such bond may commit the defendant to jail for said term of two years, unless such bond be sooner given.

Sec. 19. All express companies, railroad companies and transportation companies within this state are hereby required to keep books in which shall be entered immediately upon receipt thereof the name of every person to whom liquors are shipped; the amount and kind received; the date when delivered, and by whom, and to whom delivered, after which record shall be a blank space in which the consignee shall be required to sign his name in person to such record, which book shall be open to the inspection of any state, county or municipal officer in this state, at any time during business hours of the company. Such books shall constitute *prima facie* evidence of the facts therein stated, and be admissible as evidence in any court in this state having jurisdiction, or in any manner empowered with the enforcement of the provisions of this act. Any employe or agent

of any express company, railroad company or transportation company knowingly failing or refusing to comply with the provisions of this section, shall be guilty of a misdemeanor and punished by a fine of not less than fifty nor more than one hundred dollars and may be imprisoned in the county jail not less than thirty days nor more than six months.

Sec. 20. Any citizen or organization within this state may employ an attorney to assist the prosecuting attorney to perform his duties under this act, and such attorney shall be recognized by the prosecuting attorney and the court as associate counsel in the proceedings; and no prosecution shall be dismissed over the objection of such associate counsel until the reasons of such prosecuting attorney for such dismissal, together with the objections thereof of such associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court.

Sec. 21. The prosecuting attorney of any county, with the approval of the governor, or of the court of the county vested with authority to try criminal offenses, or of the judge thereof in vacation, may, within his discretion, offer rewards for the apprehension of persons charged with crime, or may expend money for the detection of crime. Any money expended under this section shall, when approved by the prosecuting attorney, be paid out of the county fund in the same manner as other county expenses are paid.

Sec. 22. In all cases arising under this statute the state shall have the right to appeal.

Sec. 23. This entire act shall be deemed an exercise of the police powers of the state for the protection of public health, peace and morals, and all of its provisions shall be liberally construed for the attainment of that purpose.

Sec. 24. The manufacture of alcohol, wine and liquors, and the sale of the same by the manufacturer and by wholesale druggists, shall be under the supervision of the commissioner and under such rules and regulations as he may from time to time prescribe.

Sec. 25. Paragraphs b, c, d, h and y of section one, and section ten, section forty, section sixty-six, section seventy-four, section seventy-seven, sections eighty-seven, eighty-eight, eighty-eight-a, section ninety-two and section one hundred and twenty-a of the code of one thousand nine hundred and six, as amended and re-enacted by chapter eighty-two of the acts of one thousand nine hundred and seven, and sections eighty-seven, eighty-seven-a and section one hundred and

twenty-a of chapter sixty-eight of the acts of one thousand nine hundred and nine, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 26. All of the provisions of this act shall take effect on the first day of July, one thousand nine hundred and fourteen.

## INTERPRETATIONS.

### CLUBS.

Under sections 6 and 14 of the Yost Law, clubs and associations cannot keep, and will not be permitted to keep intoxicating liquors of any kind about their premises, nor can any individual member of such clubs or associations have or keep for his personal use liquors of any kind at club houses or houses belonging to associations of like kind.

### TRANSPORTATION COMPANIES—INCLUDING STEAMBOATS.

Under section 19, express companies, railroad companies and transportation companies, including steamboats and other freight- or express-carrying vessels, must keep special records, approved by the commissioner of prohibition, showing the receipt of liquors, the kind and quantity, the names of the consignor and consignee, the date when delivered, by whom delivered and by whom received; such record must be signed in person by the consignee. None of such transportation companies, including steamboats and other freight- and express-carrying vessels, will be permitted to receive liquors at any point for delivery to another point in the state when the transportation company, including steamboats and other freight- and express-carrying vessels, does not have a regular agent at point of destination in charge of such special record. In other words, transportation com-

panies, including steamboats and other freight- and express-carrying vessels, cannot legally receive consignments for delivery and make delivery of liquors at stations in this state where there is no regular agent in charge to keep and preserve for inspection the special record prescribed.

#### DISTILLERIES.

That no rules and regulations, under section 24, will be made permitting a distillery to manufacture and sell any spirituous liquors in the state, nor to sell the same out of the state, except pure grain alcohol for medicinal, mechanical, pharmaceutical and scientific purposes, and wine for sacramental purposes by religious bodies, and the sales thereof limited to druggists only.

SUBJECT: FLAVORING EXTRACTS, ETC.

THOMAS J. DAVIS, Esq.,  
Attorney at Law,  
Harrisville, W. Va.

February 6, 1914.

Dear Sir:

I have your letter of the 30th ult., and note you inquire:

"Will it be unlawful after July first for merchants to retail flavoring extracts and such other drugs as they generally handle because the same always contain from one-half to one per cent. alcohol?"

Answering, beg to say that flavoring extracts containing alcohol, such as vanilla, lemon, etc., and used for culinary and confectionery purposes, may be sold by merchants. This general statement must be qualified, however, in this: such extracts *must not be kept for sale, nor sold, as beverages*. If any such extracts are kept for sale as beverages, or are sold to be used as *beverages*, the seller is subject to prosecution; again, although not kept for sale as beverages, nor sold as beverages, yet if such extracts are so prepared that they will produce *intoxication*, the seller will be liable to prosecution. Perfumes and other preparations containing alcohol, kept and sold as such, in

good faith, and not for purposes of evasion, and which by the nature of their ingredients cannot be used as *beverages*, and will not produce *intoxication* may be sold.

As to patent medicines: I enclose copy of letter this day written to J. M. George, Secretary of the Inter-State Manufacturing Association, Winona, Minn., in answer to his inquiry relating to sales of patent medicines by merchants.

The Prohibition Act does not materially change the present statute relating to extracts, perfumes, and patent medicines, except to more clearly define *beverages*, impose more severe penalties, and provide additional means to enforce the law. The courts have experienced little difficulty in construing the present law.

Yours very truly,

FRED. O. BLUE,  
State Tax Commissioner.

SUBJECT: PATENT MEDICINES.

J. M. GEORGE, Esq.,

February 6, 1914.

Sec'y Inter-State Mfrs. Assn.,  
Winona, Minn.

Dear Sir:

I have your inquiry of the 28th ult., and answering beg to say:

First: That any *beverages* containing as much as one-half of one per cent. of alcohol by volume cannot be sold either by merchant or druggist. Some mixtures and preparations, patented or otherwise, containing as much as one-half of one per cent. of alcohol by volume, under the guise of medicines, are made expressly to be used and sold as beverages, or if not expressly made to be so used, can be and are used as beverages. Such mixtures and preparations *cannot be sold either by merchants or druggists*. The manufacturers of such mixtures and preparations who attempt in any way to solicit or sell such mixtures or preparations in this state will be liable to prosecution.

Second. Mixtures and preparations, patented or otherwise, containing alcohol, manufactured and sold in good faith as proprietary mixtures and preparations, to be used as medicines only, may be sold by merchants; provided such mixtures and preparations *will not produce intoxication, nor be sold and used as beverages*.

Yours very truly,

FRED. O. BLUE,  
State Tax Commissioner.

## REMOVAL OF STOCK.

Request having been made for interpretation as to when stock must be removed from saloons, replies were given, per copy of the two following letters. The names of the addressees are withheld.

December 13, 1913.

Dear Sir:

I beg to acknowledge receipt of yours of the 6th inst., saying that you have made arrangements with all distillers with whom you do business, that after June 30, 1914, they will take the liquors you have on hand at the price paid them when you bought,—this transaction to be after June 30, 1914, and inquiring if my interpretation of the Yost bill will permit this to be done.

Replying thereto, beg to say that my interpretation of the Yost bill *will not* permit this to be done.

The prohibition amendment and the Yost Bill, in pursuance thereto, mean that on and after the first day of July, 1914, the manufacture, sale and keeping for sale of liquors in West Virginia will be prohibited.

Let us all understand what the prohibition amendment means, and act accordingly. In my judgment, to carry out the transaction you suggest would be a sale of liquors in West Virginia, and a violation of the law.

To be plain and to the point, you will be required to dispose of your liquors not later than midnight the 30th day of June, 1914,—have signs down and your bars closed on or before midnight, June 30, 1914. You had, therefore, better make sales to liquor dealers before the first day of July, 1914.

Very truly yours,

FRED. O. BLUE,

*State Tax Commissioner.*

B/L

February 12, 1914.

Dear Sir:

I have yours of the 11th inst., saying that you are engaged in the liquor business both at Clarksburg, W. Va., and at Cumberland, Md., and inquiring if you can ship any of your stock left over after June 30, from Clarksburg to Cumberland, or will you be compelled to ship your stock before July 1st. You say you are not selling them, but

simply transferring them to another location, and asking my opinion relative to the questions in your letter.

Replying to your questions, beg to say:

It will be *unlawful* for you to have such stock in West Virginia, for the purposes named in your letter, after midnight of June 30, 1914. It may be true that you are not keeping these liquors in West Virginia for sale in West Virginia, but you are keeping and storing them in West Virginia for the purpose of taking them to Maryland and then selling them. In other words, you are keeping and storing in West Virginia liquors for sale—true, not in West Virginia, as you say, but nevertheless you are storing them in West Virginia for the purpose of ultimately making sale. The statute not only forbids the sale of intoxicating liquors in West Virginia, but forbids the keeping or storing of liquors in West Virginia for sale, either in the state or out of the state. Therefore, there is only one safe thing for you to do, and that is, to get your liquors out of the state before midnight of June 30, 1914.

Yours very truly,

FRED. O. BLUE,  
*State Tax Commissioner.*

FOB/NL

#### BREWERIES.

Request having been made by counsel for one of the breweries in the state as to the interpretation of the Yost Law respecting breweries, reply was made per copy of letter below. The name of the addressee is withheld.

Dear Sir:

December 1, 1913.

Replying to your letter of October 26, last, beg to say, I understand from your letter the question to be:

Does the correct interpretation of the Prohibition Amendment and chapter 13, Acts 1913, permit a brewer to keep in storage at the place where made for a reasonable time after July first, 1914, beer manufactured before July 1,



1914; such beer to be kept in such storage not for the purpose of sale in this state, but until the same can be removed into storage in another state, and sold therefrom.

In my opinion, said amendment and said act are not subject to such interpretation; section 11, chapter 13, makes the storage, in case of search, *prima facie* evidence of "the unlawful selling and keeping and storing for sale of the same"; and the finding of a government license in the room searched likewise *prima facie* evidence of such unlawful selling, keeping and storing for sale. Your client would be required to have a government license. Again: to keep in storage, not for personal use, but for the purpose of removing to storage in another state, from which latter sale and distribution will be made, in my opinion is keeping and storing for sale, within the meaning of the amendment and the act.

Notice of one year and a half has been given of the state's purpose, after July first next, respecting the manufacture, sale and storing of spirituous and malt liquors within the state—and that purpose is, that on and after July first next, the state shall be dry.

With highest regards, believe me,

Very sincerely yours,

FRED. O. BLUE.

State Tax Commissioner.

### FORMS.

C. P. Form 2—Prescribed by Commissioner of Prohibition and Approved by the State Board of Health and the West Virginia Pharmaceutical Association.

#### AFFIDAVIT TO BE USED BY RETAIL DRUGGISTS IN THE SALE OF ALCOHOL.

State of West Virginia,

No. ....

County of ....., to-wit:

This day personally appeared before the undersigned authority in and for said County of ....., State of West Virginia, ....., who says that he (or she) is a person over the (name of affiant)

age of twenty-one years and is not of intemperate habits and is not addicted to the use of any narcotic drug; that he (or she) desires to purchase at ..... drug store in the town, or city, of ..... in ..... County, West Virginia, ..... ALCOHOL; and that the said alcohol is to be used (here state quantity)

.....

(here state fully for what purpose, when, where, and by whom the said  
 alcohol so purchased, is to be used)  
 and that said alcohol is not to be used as a beverage, or for any purpose  
 other than that stated in this affidavit.

Sworn to and subscribed before me this.....day of  
 ....., 19....

Druggist or Registered Pharmacist.

NOTE: For the purpose of making the foregoing affidavit, a druggist  
 or registered pharmacist is empowered to administer oath.

Forms for record books to be kept by retail druggists will be fur-  
 nished on application.

C. P. Form 3—Prescribed by Commissioner of Prohibition and Approved  
 by the State Board of Health and the West Virginia  
 Pharmaceutical Association.

AFFIDAVIT TO BE USED BY RETAIL DRUGGISTS IN THE SALE OF  
 WINE.

State of West Virginia, No.....  
 County of....., to-wit:

This day personally appeared before the undersigned authority in  
 and for said County of ....., State of West Virginia,  
 ....., who says that he (or she) is a person over the  
 (name of affiant)

age of twenty-one years and is not of intemperate habits and is not ad-  
 dicted to the use of any narcotic drug; that he (or she) desires to pur-  
 chase at ..... drug store in the town, or city, of  
 ..... in ..... County, West Virginia,  
 ..... Wine; and that said wine is to be used for sacramental  
 (state quantity)

purposes.....  
 (here state when, where, and by whom, the said wine, so purchased, is  
 to be used)

and that said wine is not to be used as a beverage, or for any purpose  
 other than that stated in this affidavit.

Sworn to and subscribed before me this.....day of  
 ....., 19....

Druggist or Registered Pharmacist.

NOTE: For the purpose of making the foregoing affidavit, a druggist  
 or registered pharmacist is empowered to administer oath.

This affidavit should be on pink paper, to distinguish from the one  
 used for alcohol.

C. P. Form 1.—Prescribed by Commissioner of Prohibition and Approved by  
the State Board of Health and the West Virginia Pharma-  
ceutical Association.

No.....

C. P. Form 1

PREScription FOR ALCOHOL.

STUB

Rx

....., 191....

No. ....

The amount of alcohol prescribed in the foregoing prescription is to be  
used for .....  
(State injury, malady, or disease for which prescribed)  
and is to be used.....; that said alcohol is prescribed for  
(state how to be used)

To.....  
(Name of Druggist)

.....; that the undersigned physician  
(Name of Patient)

For.....  
(Name of Patient)

has previously prescribed for said patient, within the year next preceding  
this prescription,..... prescriptions; and that the alcohol herein  
(Number)

Grain Alcohol.....  
(Quantity)

prescribed is absolutely necessary for medicine and is not to be used as a  
beverage; that the undersigned physician, at the time of giving this pre-  
scription, made a personal examination of such person and that he (or she)  
is known to the undersigned physician to be of temperate habits and not  
addicted to the use of any narcotic drug.

..... M. D.

.....M. D.

NOTE—It is suggested that these be printed in book form so that stubs  
can be preserved.

C. P. Form 10.

# COMPLAINT FOR SELLING LIQUORS UNLAWFULLY.

State of West Virginia,

County of ....., to-wit:

Personally appeared before me the undersigned authority, in and for the county aforesaid, ....., who being by me first  
(name of complainant)

duly sworn, under oath, complains and says that on the ..... day  
of ....., 19...., in said county aforesaid,.....  
(name of accused)

did unlawfully manufacture, sell, offer, expose, keep or store for sale, or barter, intoxicating liquors as defined by section one, chapter thirteen, Acts of the legislature 1913, contrary to the laws of the State of West Virginia, and he, the said....., therefore prays  
(name of complainant)

that the said ....., may be apprehended and held  
(name of accused)

to answer said complaint and further dealt with according to law.

Dated this ..... day of ....., 19....

.....  
(name of person making complaint)

Taken, subscribed and sworn to before me this ..... day of  
....., 19....

.....  
(name of officer)

.....  
(title of officer before whom complaint is made)

NOTE—If made upon information insert and interline words "upon information" after the word "sworn".

# WARRANT FOR SELLING LIQUORS UNLAWFULLY.

State of West Virginia,

County of ....., to-wit:

To ....., or any constable of said county:

Whereas, ....., has this day made complaint  
(name of complainant)

on oath, before me, ....., a justice of the peace of said  
(name of officer)

county, that ..... on the ..... day of .....  
(name of accused)

19....., in said county aforesaid, did unlawfully manufacture, sell, offer, expose, keep or store for sale, or barter, intoxicating liquors, as defined by section one of chapter thirteen, Acts of 1913, contrary to the laws of the State of West Virginia: These are therefore to command you, in the name of the State of West Virginia, forthwith to apprehend the said ....., and bring him before me, or some other  
(name of accused)

justice of the said county, to answer the said complaint and to be further dealt with according to law.

Given under my hand this ..... day of ....., 19.....

Justice of the Peace for the County of.....

NOTE:—This form may be used by a mayor, by substituting title as such and inserting his municipality and may by him be directed to designated officer of town or city.

C. P. Form 11.

**COMPLAINT FOR SELLING LIQUORS UNLAWFULLY AND FOR SEARCH AND SEIZURE.**

State of West Virginia,

County of ....., to-wit:

Personally appeared before me the undersigned authority, in and for the county aforesaid, ....., who being by me first  
(name of complainant)

duly sworn, under oath, complains and says that on the ..... day of ....., 191....., in the county aforesaid, .....  
(name of accused)

did unlawfully manufacture, sell, offer, expose, keep or store for sale or barter, intoxicating liquors as defined by section one of chapter thirteen, acts of the legislature of 1913, contrary to the laws of the State of West Virginia; and the said complainant as aforesaid, upon oath, further complains that he has cause to believe and does believe that such liquors as aforesaid, in said county aforesaid, are manufactured, sold, offered, exposed, kept or stored for sale or barter in that certain

(Here describe with full particularity, the house, building, boat, or other place, and location thereof)

contrary to the laws of the State of West Virginia; and he, said ..... therefore prays that the said  
(name of person making complaint)

..... may be apprehended and held to  
(name of person accused)

answer said complaint and dealt with according to law; and that the said ..... aforesaid, be

(house, building, or other place described)

searched, and that all liquors found therein, together with all vessels, bar fixtures, screens, glasses, bottles, jugs and other appurtenances apparently used in the sale, keeping or storing of liquors contrary to law,

be seized and held to be further dealt with according to law; and that all parties found in said building aforesaid be arrested, held and further dealt with according to law.

Dated this ..... day of ....., 191....

.....  
(name of person making complaint)

Taken, subscribed and sworn to before me this ..... day of ....., 191....

.....  
(name of officer)

.....  
(title of officer before whom complaint is made)

NOTE:—If made upon information insert and interline words "upon information" after the word "sworn".

This form may be used by a mayor by substituting title as such and inserting his municipality, and may be directed to designated officer of town or city.

#### WARRANT FOR ARREST, SEARCH AND SEIZURE.

State of West Virginia,

County of ....., to-wit:

To ....., or any constable of said county:

Whereas, ..... has made complaint, on oath, before  
(name of complainant)

me, ....., a Justice of the Peace of said county, that  
(name of officer)

..... on the ..... day of .....,  
(name of accused)

19...., in said county aforesaid, did unlawfully manufacture, sell, offer, expose, keep or store for sale, or barter, intoxicating liquors as defined by section one, chapter thirteen, Acts 1913, contrary to the laws of the State of West Virginia, and did further make complaint, on oath, before me, that he has cause to believe and does believe that such liquors as aforesaid, in said county aforesaid, are manufactured, sold, offered, exposed, kept or stored for sale or barter in that certain.....

(here describe with full particularity

.....  
the building, house, boat, or other place and location thereof)

in said county aforesaid, contrary to the laws of the State of West Virginia. These are therefore to command you, in the name of the State of West Virginia, forthwith to apprehend the said.....

(name of accused)

and bring him before me, or some other justice of said county, to answer said complaint and to be further dealt with according to law: and these are, to command you further, in the name of the State of West Virginia forthwith to enter that certain.....

(here describe with full par-

.....

ticularity the building, house, boat, or other place and location thereof) in said county aforesaid, and there search and seize all liquors found therein, together with all vessels, bar fixtures, screens, glasses, bottles, jugs, and other appurtenances apparently used in the sale, keeping or storing of liquors contrary to law, and to hold the same to be further dealt with according to law: and these are to command you further, in the name of the State of West Virginia, to arrest all parties and persons found in said premises aforesaid and bring them before me or some other justice of said county, to answer the said complaint and to be further dealt with according to law.

Given under my hand this ..... day of ....., 19.....

Justice of the Peace of the County of.....

NOTE:—This form may be used by a mayor, by substituting title as such and inserting his municipality, and may by him be directed to designated officer of town or city.

#### C. P. Form 12.

#### COMPLAINT FOR SEARCH AND SEIZURE.

State of West Virginia,

County of ....., to-wit:

Personally appeared before me the undersigned authority, in and for the said county aforesaid, ....., who being by me first  
(name of complainant)

duly sworn, under oath, complains and says that he has cause to believe, and does believe, that intoxicating liquors, as defined by section one, chapter thirteen, Acts of the legislature 1913, are being manufactured, sold, offered, exposed, kept or stored for sale, or bartered in said county aforesaid in that certain .....

(here describe with full particularity the

building, house, boat, or other place and location thereof)

contrary to the laws of the State of West Virginia, and he, said  
..... therefore prays that the said  
(name of complainant)

(here describe building, house, boat or other place and location thereof)

be searched, and that all liquors found therein, together with all vessels, bar fixtures, screens, glasses, bottles, jugs and other appurtenances apparently used in the sale, keeping or storing of liquors, contrary to law, be seized and held to be further dealt with according to law; and that

all parties or persons found in said.....  
 (here describe building, house,  
 boat, or other place and location thereof)

.....  
 aforesaid be arrested and held, and further dealt with according to law.

Dated this..... day of ....., 19.....

.....  
 (name of complainant)

Taken, subscribed and sworn to before me this ..... day of  
 ....., 19.....

.....  
 (name of officer)

.....  
 (title of officer before whom complaint is made)

NOTE:—This form may be used by justice or mayor.

This form of complaint and warrant to be used when complainant  
 does not know name of parties suspected of selling, etc.

#### WARRANT FOR SEARCH AND SEIZURE.

State of West Virginia,

County of ....., to-wit:

To ....., or any constable of said county:

Whereas, ....., has made complaint on oath, before me,  
 (name of complainant)

....., a justice of the peace of said county, that he  
 (name of officer)

has cause to believe, and does believe that intoxicating liquors as defined  
 by section one, chapter thirteen, Acts of the legislature of one thousand  
 nine hundred and thirteen, are being manufactured, sold, offered, exposed,  
 kept or stored for sale, or bartered, in said county aforesaid, in that  
 certain .....

(here describe with full particularity the building, house, boat

.....  
 or other place, and location thereof)

contrary to the laws of the State of West Virginia: These are therefore  
 to command you, in the name of the State of West Virginia, forthwith to  
 enter that certain .....

(here describe with full particularity the building,

.....  
 house, boat, or other place and location thereof)

in said county aforesaid, and there search and seize all liquors found  
 therein, together with all vessels, bar fixtures, screens, glasses, bottles,  
 jugs, and other appurtenances apparently used in the sale, keeping or  
 storing of liquors contrary to law, and to hold the same to be further  
 dealt with according to law: And these are to command you further, in  
 the name of the State of West Virginia, to arrest all parties and persons  
 found in said premises aforesaid and above described and bring them



before me, or some other justice of said county, to answer the said complaint, and to be further dealt with according to law.

Given under my hand this ..... day of ....., 19.....

Justice of the Peace for the County of.....

NOTE:—This form may be used by a mayor, by substituting title as such, and his municipality, and may by him be directed to designated officer of town or city.

C. P. Form 14.

# BOND TO HOLD TO GRAND JURY.

State of West Virginia,

County of .....

KNOW ALL MEN BY THESE PRESENTS: That we,.....

..... and .....

(name of accused)

(name of surety)

are held and firmly bound unto the State of West Virginia in the just and full sum of \$..... for the payment whereof well (not less than \$500.00)

and truly to make, we bind ourselves, our personal representatives, our heirs and assigns, jointly and severally, firmly by these presents;

Witness our hands and seals this ..... day of....., 19.....

THE CONDITION of the above obligation is such that whereas, the above bound .....

(name of accused)

has been arrested and brought before me....., a justice of the peace of said county, charged with selling intoxicating liquors, as defined by section one of chapter thirteen of the acts of the legislature of one thousand nine hundred and thirteen, in said county aforesaid, contrary to the laws of the State of West Virginia, and upon examination of the said accused, it appears that there is probable cause to believe him guilty of the offense as charged, and accordingly he has been held to answer any indictment that may be returned by the grand jury of said county.

Now, therefore, if the said .....

(name of accused)

shall appear in person before the .....

(Circuit, Criminal or Intermediate)

Court of said county on the first day of the next term thereof, and not depart the court without its leave, to answer an indictment, if one be preferred against him, and to abide by and perform the further order

of said court in relation thereto, then this obligation to be void; otherwise to remain in full force and virtue.

..... (Seal)

(name of accused)

..... (Seal)

(name of surety)

Entered into before and approved by me this ..... day of  
....., 19.....

.....  
(Justice of the Peace of said county)

NOTE:—This form may be used by a mayor by substituting title and inserting municipality.

C. P. Form 15.

# BOND NOT TO SELL.

State of West Virginia,

County of .....

KNOW ALL MEN BY THESE PRESENTS: That we,.....  
..... and .....

(name of accused)

(name of surety)

are held and firmly bound unto the State of West Virginia in the just and full sum of FIVE HUNDRED DOLLARS, for the payment whereof well and truly to make, we bind ourselves, our personal representatives, our heirs and assigns, jointly and severally, firmly by these presents:

Witness our hands and seals this ..... day of....., 19.....

THE CONDITION of the above obligation is such that whereas, the above bound .....has been arrested

(name of accused)

and was this day brought before me.....

a Justice of the Peace of said county, charged with unlawfully selling intoxicating liquors, as defined by section one of chapter thirteen of the acts of the legislature of one thousand nine hundred and thirteen, in said county, contrary to the laws of the State of West Virginia, and upon examination of said ..... it appears

(name of accused)

that there is probable cause to believe him guilty of the offense so charged, and accordingly he has been held to answer any indictment that may be returned by the grand jury of said county.

Now, therefore, if the said .....

(name of accused)

shall not violate any of the provisions of chapter thirteen, acts of the legislature one thousand nine hundred and thirteen, during the time

intervening between the date of this bond and the adjournment of the next grand jury term of the ..... Court of (Circuit, Criminal or Intermediate) said county, then this obligation to be void; otherwise to remain in full force and virtue.

..... (Seal)  
(name of accused)

..... (Seal)  
(name of surety)

Entered into before and approved by me this ..... day of ..... 19.....

.....  
(Justice of the Peace of said county)

NOTE:—This form may be used by a mayor by substituting title and inserting municipality.

This bond must be given in addition to bond for appearance in Court, in default of this bond accused must be committed to jail. Sec. 10.

**RULES AND REGULATIONS MADE BY THE COMMISSIONER OF PROHIBITION FOR THE SALE OF ALCOHOL AND WINE as Provided for by Sections Four and Twenty-four, Acts of One Thousand Nine Hundred and Thirteen.**

Prescribed by State Commissioner of Prohibition. Approved by State Board of Health and West Virginia Pharmaceutical Association.

---

First: A wholesale druggist within the meaning of these rules, is one whose business is that of generally selling at wholesale to re-

tail druggists, in good faith and not for the purpose of evading the prohibition laws of the state, or aiding or abetting others in violating the same, by any scheme or device whatsoever; any such wholesaler desiring to do business in this state and who has made application in writing to the state commissioner of prohibition, and has received from him a permit in writing to do so, may sell to retail druggists as they are hereinafter defined, alcohol for medicinal, pharmaceutical, mechanical or scientific purposes and wine for sacramental purposes, by complying with the rules and regulations prescribed by the commissioner of prohibition.

Second: A retail druggist within the meaning of these rules, shall be defined as one who generally sells drugs and pharmaceuticals at retail, and who is a registered pharmacist, or who employs a registered pharmacist, and who has applied to, and received from, the proper authorities of his county, permission and license, as required by law, to carry on the business of a retail druggist, and one who conducts such business in good faith and according to law, and not for the purpose of selling intoxicating liquors of any kind in violation of law.

Third: A special record, the form of which shall be prescribed by the commissioner of prohibition, of all sales, shall be kept by such wholesale druggist who has received such permit aforesaid, which will show the names and locations of parties to whom sold, quantity and kind of alcohol and wine; and a written report shall be made from such record to the commissioner of prohibition not later than the tenth day of each month, showing all such sales for the preceding month, to whom sold, his location, and the quantity and kind sold; and such report shall be sworn to by the owner, manager or party actually in charge of such wholesale drug store; and in said affidavit shall be stated, that the accompanying report is true in every particular, and that it contains a complete list of all sales made by such wholesale druggist, and that to the best of his knowledge and belief, all of such alcohol and wine so bought by the purchaser, was sold or used in good faith, and not sold or used in violation of law governing the use and sale of intoxicating liquors.

Fourth: The commissioner of prohibition reserves the right to notify such wholesale druggist not to sell alcohol or wine to any retail druggist whom he has reason to believe is violating the law, or for any other reasons, to the commissioner of prohibition, deemed proper; and upon such notice to such wholesale druggist, in writing, he shall

at once discontinue selling to such retail druggist, and a sale made to such retail druggist, after such notice is given, shall be deemed a sale made contrary to law.

Fifth: The commissioner of prohibition reserves the right to revoke or suspend any permit granted to a wholesale druggist who he has reason to believe is selling contrary to the rules herein named, or in violation of the law regulating the sale of intoxicating liquors; and a sale of alcohol or wine made by such wholesale druggist after such permit is revoked, shall be a sale contrary to law.

Note. Forms for records to be kept by wholesale druggists will be furnished on application.

## **DIGEST OF PROHIBITION LAW.**

### **ACT (PROHIBITION)**

Shall be deemed exercise powers of the State for protection of public health, peace and morals and its provisions shall be liberally construed for the attainment of that purpose. Sec. 23.

### **ADVERTISERS—ADVERTISEMENTS**

Advertising liquors for self or for another by signs, bill-boards, newspapers, periodicals, or otherwise, a misdemeanor. Sec. 8.

Circulating or distributing price lists, circulars or order blanks for advertising liquors, a misdemeanor. Sec. 8.

### **AGENTS**

Of the manufacturer, seller or person keeping, storing, offering or exposing for sale shall be deemed guilty of manufacturing, selling, keeping, offering and exposing for sale. One as agent for the purchaser of liquors shall be deemed guilty of manufacturing, selling, keeping, storing and exposing for sale of liquors. Sec. 3.

Of one having liquor in his possession, or of one named in a government license, presumed to be illegally selling or keeping for sale of liquors. Sec. 11.

Of railroads, express and transportation companies. See Common Carriers.

**ASSOCIATIONS**—See "Clubs." Also Sec. 6.

**ASSOCIATES**

Of a person named in government license, presumed to be illegally selling and keeping for sale of liquors: of occupant or proprietor of premises in which liquors are seized presumed to be illegally selling and keeping for sale of liquors. Sec. 11.

**ATTORNEY GENERAL**

May maintain suit in name of State to abate such nuisances as are defined in section 17. Sec. 14.

**BILL-BOARDS**

For advertisement of liquors, or on which liquors are advertised, a misdemeanor. Permitting such boards or other forms or methods of advertising to be posted, kept or maintained on one's premises makes him guilty of misdemeanor. Sec. 8.

**BOAT HOUSES**

Wherein intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law shall be held and deemed common and public nuisances and may be abated as such. Any person who shall maintain, aid or abet or knowingly be associated with others in maintaining such nuisances shall be fined and imprisoned. Sec. 14.

**BONDED WAREHOUSES**

United States bonded warehouses may store liquors manufactured in the state prior to July 1, 1914, in the custody of the United States collector of revenue, when tax is paid and said liquors in transit from such warehouses to points outside of state. Sec. 2.

**BUILDINGS**

Wherein intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law shall be held and deemed common and public nuisances and may be abated as such. Any person who shall maintain, aid or abet or knowingly be associated with others in maintaining such nuisances shall be fined and imprisoned. Sec. 14.

## CARRIERS

Unless a *common carrier*, a carrier is either agent of seller or purchaser and is guilty of selling and keeping for sale of liquors. Sec. 3.

A sale of liquors is deemed to be made in county *where delivery is made by the carrier*, whether common carrier or otherwise. Sec. 3.

## CARRIERS—COMMON

All express, railroad and transportation companies within the State required to keep books in which shall be entered immediately upon receipt thereof, the name of every person to whom liquor is shipped, the amount and kind, the date when delivered, by whom and to whom delivered, in which record the consignee shall sign his name in person. Such record shall be open to inspection of any State, county or municipal officer. Such books shall be *prima facie* evidence of the facts stated therein and be admissible as evidence in any court of the state in any manner empowered with the enforcement of the liquor laws. Any employe or agent of any express, railroad or transportation company, knowingly failing or refusing to comply with such requirements shall be guilty of misdemeanor punishable by fine or imprisonment or both. Sec. 19.

See interpretations hereof under "Interpretations," page 17.

## CIDER

By whom and for what purposes may be made. Sec. 4.

## CITIZENS

Acting as agent of seller or purchaser guilty of selling and keeping for sale of liquors. Sec. 3.

Delivery of liquors by, sale deemed to be made in county wherein delivery is made. Sec. 3.

May manufacture for his own domestic consumption wine or cider; may manufacture from fruit grown exclusively in the state vinegar and non-intoxicating cider for use or sale. Sec. 4.

If of intemperate habits or addicted to narcotic drugs and shall make affidavit to procure alcohol or wine, guilty of misdemeanor. Sec. 5.

If having made affidavit to procure alcohol or wine, for purposes stated therein, and then use such alcohol or wine as a bever-

age, or other purpose than that stated in affidavit, he is guilty of misdemeanor. Sec. 5.

Cannot keep liquors for *use, gift, sale, etc.*, at a club or any association with others. Sec. 6.

Keeping or giving away liquors by any shift or device to avoid the law shall be deemed unlawful selling. Sec. 7.

Liquors seized in any room, building or place occupied by a person, when warrant has been issued shall be *prima facie* evidence of the unlawful selling or keeping for sale by the person keeping such room, building, or place. Sec. 11.

Citizens may maintain suit to abate such nuisances as are defined in section 14; reasonable attorneys' fees for plaintiff's counsel in such suit, if decree is in favor of plaintiff shall be taxed as part of costs and collected from the defendant and when collected be paid to the attorney for plaintiff. Sec. 17.

Any citizen or organization within the State may employ an attorney to assist the prosecuting attorney in the performance of his duties under this act; such special attorney shall be recognized by the prosecuting attorney and court as associate counsel in the proceedings and no prosecution shall be dismissed over the objection of such associate counsel until the reasons of the prosecuting attorney therefor together with the objections thereto of such associate counsel shall be filed in writing, argued by counsel, and considered by the court. Sec. 20.

## CLUBS

Every person who shall directly or indirectly keep or maintain by himself or by associating with others, or in any manner aids, assists or abets in keeping or maintaining any club house in which liquor is received or kept for purpose of use, gift, barter or sale, shall be deemed guilty of misdemeanor punishable by fine and imprisonment. And every person who shall use, barter, sell or give away or assist or abet in bartering, selling or giving away any liquors so received or kept shall be deemed guilty of misdemeanor and punished as aforesaid. Shareholders or associates in any club or association shall be competent witnesses to prove any violations of the provisions of this act and shall not be excused from testifying as to any offense committed by another against the provisions of the act. Sec. 6.

See interpretation hereof under "Interpretations," page 17.



Any club or club room violating the provisions of the act shall be held and deemed a common and public nuisance. And any person who shall maintain such nuisance shall be deemed guilty of misdemeanor punishable by fine or imprisonment. And such club violating the provisions of the act shall be abated as a nuisance. Sec. 14.

#### COLLECTOR OF INTERNAL REVENUE

Certificate showing payment of the United States special tax required of liquor dealers is sufficient evidence of the payment of such tax by the person named therein, his associations, etc. Sec. 13.

#### COMMISSIONER OF PROHIBITION

The duty of: to supervise the enforcement of the laws effecting the sale of liquors. He, his deputies and agents, to report violations of the liquor laws to the prosecuting attorneys and report violations thereof to any court. And may conduct prosecutions in any court having jurisdiction. Invested with powers of prosecuting attorneys, Attorney General, and of sheriffs, their deputies, constables and police officers. Sec. 16.

He may maintain suit in equity to abate such nuisance as is defined in section 14. Sec. 17.

Manufacture of alcohol, wine and liquors and the sale thereof by the manufacturers and wholesale druggists to be under the supervision of the Commissioner and under such rules and regulations as he may prescribe. Sec. 24.

See interpretation of section 24, as to distilleries, under "Interpretations" page 18.

#### CONSTABLE

In executing warrant issued under the provisions of the act he may, when necessary for the arrest or identification of the person offending, or the seizure of liquors, break open and enter house, building or place. Sec. 12.

#### COUNTY COURTS

Shall pay, out of public funds, expenses for the detection of crime or rewards for apprehension of criminals, when the prosecuting attorney has, with the approval of the Governor, or court vested with the authority to try criminal cases in the county, or

the judge thereof in vacation, approved and authorized incurred expense for such detection or reward. Sec. 21.

#### **DISTILLERS (See Manufacturers)**

See "Interpretations", page 18.

#### **DRUGGISTS**

Retail druggists cannot sell malt or brewed drinks whether intoxicating or not; nor patent medicines or other preparations or liquors that will intoxicate. Nor any beverage containing so much as one-half of one per centum of alcohol by volume. Sec. 1.

Cannot sell absinthe or any drink compounded with it. Sec. 2.

May keep and sell pure grain alcohol for medicinal, pharmaceutical, mechanical and scientific purposes or any United States pharmacopeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation exempted by provisions of the national pure food law, the sale whereof does not require payment of a United States liquor dealer's tax. May sell wine for sacramental purposes. The sale of alcohol can only be made either on prescription (as required by law) of a reputable physician in good standing for medicinal purposes, or affidavit (required by law) of purchaser for pharmaceutical, mechanical and scientific purposes: the sale of wine for sacramental purposes can be made only on having affidavit (required by law) of purchaser. Offense to make sale otherwise. Offense to knowingly sell to a minor, or person of intemperate habits or addicted to the use of narcotic drugs or to be used for any purposes not stated in the prescription or affidavit. One sale only on a prescription or an affidavit. Druggists or pharmacists authorized to administer oath on affidavit. Prescriptions and affidavits to be kept filed by the druggists open to inspection. Sec. 4. See forms of prescriptions and affidavits, pages 22-24.

Wholesale druggists may sell pure grain alcohol to retail druggists for medicinal, pharmaceutical, scientific and mechanical purposes, and wine for sacramental purposes. Sec. 4.

Such sales by wholesale druggists under supervision of the Commissioner of Prohibition and rules and regulations prescribed by him. Sec. 24.

See "Rules and Regulations," pages 32-34.

## EXPRESS COMPANIES (See Common Carriers, under title of CARRIERS.)

### JUDGES

Of Circuit, Criminal and Intermediate courts, in term or vacation, upon information under oath that one is making, selling, keeping or storing for sale, liquors contrary to law, or that liquors are being made, sold, kept or stored for sale in building contrary to law, shall issue warrant requiring the person suspected to be brought before him for examination, or the building searched and the persons found therein to be brought before him for examination. And in same warrant issued require the officer to whom directed to seize, and hold, all liquors, fixtures, etc., found therein. Sec. 9.

If probable cause shown on examination, the accused to be held under bond in penalty of five hundred dollars to next grand jury. In default of bond to commit to jail. To recognize all material witnesses to appear before grand jury. To require accused to give bond in penalty of five hundred dollars conditioned not to violate liquor laws, and in default of such bond to commit accused to jail. Sec. 10.

To appoint some responsible person to immediately destroy liquors seized, upon conviction of accused. Sec. 11.

To summarily punish for contempt any person violating terms of any injunction granted in proceedings under the act, by fine of not less than one hundred nor more than five hundred dollars and by imprisonment in county jail not less than thirty days nor more than six months without impanelling jury to try same. Sec. 17.

Shall recognize special attorneys employed to assist prosecuting attorney. Shall dismiss no prosecution over objection of such special attorney unless reasons of prosecuting attorney to dismiss are filed in writing, the objections thereto of the special attorney filed in writing, and upon argument thereof by the court. Sec. 20.

### JUSTICES OF THE PEACE (See Judges—Secs. 9 and 10).

See forms of complaints and warrants and bonds, pages 25-32.

### LIQUORS. Defined. Sec. 1.

**MANUFACTURERS**

May make pure grain alcohol for sale at wholesale to retail druggists for medicinal, pharmaceutical, scientific and mechanical purposes, and wine for sacramental purposes by religious bodies. Sec. 4.

Such manufacturing and selling to be under such rules and regulations as may be prescribed by the Commissioner of Prohibition. Sec. 24.

Of patent medicines. See letter to J. M. George, Secretary, page 19.

**MAYORS** (See Judges—Secs. 9 and 10).

See forms of complaints and warrants and bonds, pages 25-32

**MERCHANTS**

Can not sell malt or brewed drinks whether intoxicating or not. This includes what are usually known as soft drinks, if the same are malted or brewed. Can not sell patent medicines or other preparations or liquors that will intoxicate, nor any beverage containing so much as one-half of one per centum of alcohol by volume. Sec. 1. See letter to J. M. George, secretary, page 19, and letter to T. J. Davis, page 18.

**NEWSPAPERS**

Can not advertise sale or keeping for sale of liquors and to do so is a misdemeanor. Sec. 8.

**PATENT MEDICINES.** See Merchants.

**PHARMACISTS** (See Druggists).

**PHYSICIANS**

May give prescription for pure grain alcohol, to be filled by druggists for medicinal purposes. Physician must be in good standing in his profession, not of intemperate habits nor addicted to the use of narcotic drugs. The prescription must state the amount of alcohol, disease or malady of patient, how much used, name of person for whom prescribed and number of previous prescriptions given by the physician to the person named, within one year preceding date of prescription; that the alcohol so prescribed is absolutely necessary as a medicine and not to be used as a beverage. That the physician made personal examination of the patient or

person and that he is known to the physician to be of temperate habits and not addicted to the use of any narcotic drug. Sec. 4.

If prescription not given within the requirements of section 4, or he shall fail to comply with any of the requirements thereof, he shall be deemed guilty of misdemeanor punishable by fine of not less than one hundred nor more than five hundred dollars and by imprisonment of not less than thirty days nor more than six months and, within the discretion of the court, suspension of six months of his license to practice. Sec. 5.

See form of prescription, page 24.

## POLICE

In executing warrant issued under the provisions of this act he may, when necessary for the arrest or identification of the person offending, or the seizure of liquors, break open and enter house, building or place. Sec. 12.

## PROSECUTING ATTORNEY

Must ascertain if offense is "first" offense or "second" offense. If second must so state in indictment and introduce record evidence. Sec. 3.

May maintain suit to abate such nuisance as is defined in section 14. Sec. 17.

Shall recognize special attorneys employed by any citizens or organization to assist in prosecutions under the act. No prosecution to be dismissed over the objection to such special attorney, etc. Sec. 20.

May, with approval of the Governor, or of the court of the county vested with authority to try criminal offenses, or of the Judge thereof in vacation, within his discretion, offer rewards for the apprehension of persons charged with crime, or may expend money for the detection of crime. Sec. 21.

## RAILROADS (See Carriers)

SALOONISTS See "Interpretations", letters, pages 20-21.

## SHERIFF

In executing warrant issued under provisions of the act he may, when necessary for the arrest or identification of the person of-

fending, or the seizure of liquors, break open and enter house, building or place. Sec. 12.

## SIGNBOARDS

For advertising sale or keeping for sale of liquors a misdemeanor. To maintain or permit same to be maintained on premises or premises under one's control a misdemeanor, punishable by fine of not less than one hundred nor more than five hundred dollars. Sec. 8.

## SODA FOUNTAINS

Can not sell what are known as soft drinks if *malted or brewed, whether intoxicating or not*. Sec. 1.

## SOLICITORS

Soliciting orders for liquors or absinthe is misdemeanor, for the first offense, a felony for the second offense. Sec. 3.

## STATE

In all cases arising under this statute the state has the right to appeal. Sec. 22.

## STATE TAX COMMISSIONER

Ex-officio State Commissioner of Prohibition. Sec. 15.

STEAMBOATS See Carriers. See "Interpretations", page 17.

WHOLESALE DRUGGISTS (See Druggists)

FILED  
NOV 8 1916  
JAMES D. MAHER  
RECEIVED

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1916.

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No. 75.

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THE JAMES CLARK DISTILLING CO., APPELLANT,  
vs.  
THE WESTERN MARYLAND RAILWAY COMPANY AND  
THE STATE OF WEST VIRGINIA, APPELLEES.

---

No. 76.

---

THE JAMES CLARK DISTILLING CO., APPELLANT,  
vs.  
THE AMERICAN EXPRESS COMPANY AND THE STATE OF  
WEST VIRGINIA, APPELLEES.

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF MARYLAND.

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REPLY BRIEF FOR THE STATE OF WEST  
VIRGINIA, APPELLEE, ~~TO THE BRIEF~~

~~FILED BY MR. JACKSON~~  
W. B. WHEELER,  
*Of Counsel for the State of West Virginia.*





## INDEX.

1. Fundamental Error of Appellant's Argument.....	2
2. Reply to Construction of Webb-Kenyon Law by Appellant .....	15
3. Purpose of Act as Shown by Advocates of the Law	19

## INDEX OF CASES.

1. Adams Express Company vs. Kentucky, 238 U. S. 190 .....	5
2. American Express Company vs. Iowa, 196 U. S. 146	24
3. Bowman Case, 125 U. S. 465 .....	6
4. Glenn vs. Southern Express Company, 87 S. E. Rep. 136 .....	9
5. Leisey vs. Hardin, 135 U. S. 108.....	2
6. Rahrer Case, 140 U. S. 445 .....	3
7. Vance vs. Vandercreek, 170 U. S. 452.....	4
8. West Virginia vs. Adams Express Company, 219 Fed. 802 .....	5



Nos. 75 and 76.

# **Supreme Court of the United States**

OCTOBER TERM, 1916.

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THE JAMES CLARK DISTILLING CO., APPELLANT,  
vs.

THE WESTERN MARYLAND RAILWAY COMPANY AND  
THE STATE OF WEST VIRGINIA, APPELLEES.

---

THE JAMES CLARK DISTILLING CO., APPELLANT,  
vs.

THE AMERICAN EXPRESS COMPANY AND THE STATE OF  
WEST VIRGINIA, APPELLEES.

---

REPLY BRIEF FOR THE STATE OF WEST VIRGINIA.

---

## **STATEMENT OF CASE.**

Five briefs have been filed by the appellees since this case was first assigned for hearing in the October Term of 1914, one by Hon. Fred. Blue, and one by the undersigned in 1914; one each by the attorneys for the appellee in the October Term of 1915. Also a brief presented by 15 attorneys general in the October Term of 1915.

We file herewith a reply brief for the State of West Virginia, which we request to have considered in connection with the briefs above mentioned.

The last brief filed ~~for appellant by Mr. Jackson~~, gives the impression that opposing counsel have lost faith in the efficacy of their argument against the constitutionality of the Webb-Kenyon law, and now confine their claims to the alleged right to ship liquor into prohibition territory for the individual use of the consumer.

### FUNDAMENTAL ERROR OF APPELLANT'S ARGUMENT.

The error which is manifest all through appellant's argument is the failure to distinguish between the basic constitutional rights and rights of the appellant which may be prohibited by Congress under authority of the Interstate Commerce clause in the Constitution. In one sense it is true that appellant had a constitutional right, before the passage of the Wilson Act and Webb-Kenyon law, to ship liquor into "dry" territory for the individual use of the consumer <sup>or</sup> to persons to sell it in the original package, regardless of the laws of the State. This right, however, was not an inherent right; it was predicated on the failure of the proper legislative body to act on this question. This was made manifest in the leading case cited by appellant,—Leisey vs. Hardin, 135 U. S. 108. In that case the Court held that a liquor dealer could, through the channels of interstate commerce, ship intoxicating liquors into a Prohibition State, and the consignee had a right to receive it and sell it in that Prohibition State although the sale in the State was prohibited. The Court also said in the same case:

The responsibility is upon Congress so far as the regulation of interstate commerce is concerned

to remove the restriction upon the State in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

At that time it was claimed that a person had a constitutional right to receive liquor in a Prohibition State, and to sell it there in violation of the law of the State, because Congress had not acted upon this phase of interstate commerce. This decision resulted in the passage of the Wilson Act. The Wilson Act made all intoxicating liquors subject to the laws of the State upon "arrival". This, the Supreme Court in *Rhodes vs. Iowa*, 170 U. S. 412, very properly construed to mean when the same had come into the hands of the consignee. This gave the liquor dealer a clear right to ship liquor to an individual in Prohibition territory for his own personal use, and, with the characteristic cunning of the liquor interests, they used this means to have liquor put into the hands of bootleggers who would distribute it in the community.

In all of these cases the pronouncement of the Court is predicated not upon the inability of Congress to act, but upon its failure to act. The Court said in the *Rahrer* case, 140 U. S. 545:

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

In other words, Congress has plenary power over interstate commerce. Whenever the State attempted

to control commodities through interstate commerce before Congress had removed from such commodities their interstate character, this Court properly held such law to be unconstitutional.

Keeping this distinction in mind, the case of *Vance vs. Vandercook*, 170 U. S. 452, is easily distinguished. South Carolina not only did not prohibit the liquor traffic, but was engaged in the liquor traffic as a State, through the dispensary system. A state law attempted to regulate the traffic in intoxicating liquors in interstate commerce requiring a person ordering liquor for his own use to communicate his purpose to the State Chemist.

In the case in question it happened to be a shipment for personal use. But the Court would have necessarily decided the case as it did, even though the liquor was shipped to the consignee and he intended to sell it. As Senator Bacon well said, in the hearing on this proposition in the Senate (61st Cong. Senate Doc. 146, at p. 184.)

“The Supreme Court in that case was dealing with a case where a man had purchased and had liquor shipped to him for his own use. But there is not a word in that decision which would not have applied with equal force to a man who had it for the purpose of selling it.”

This case, therefore, is no authority for the proposition that a person has a constitutional right to have liquor shipped to him for his own use, if Congress decides to so regulate interstate commerce that it is impossible for him to get it for that purpose. This case has been over-quoted, and misconstrued, and can be clearly differentiated from the facts and the law in this hearing.

This Court, as well as other courts, State and Federal, have clearly pointed out the distinction. In *State of West Virginia vs. Adams Express Company*, 219 Fed. Rep. 802, Judge Wood said with reference to the *Vance vs. Vandercook* case:

“It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the State, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.”

It is manifest from the above that the constitutional right of a liquor dealer to ship liquor into “dry” territory and have it sold in the original package was prohibited by the Wilson law. The decisions construing this law are ample authority for the Webb-Kenyon law which proposed to take away from a citizen of a State the right which he had under the Wilson law; namely, to have liquor shipped for his own personal use regardless of the law of such State preventing it.

The whole history of the effort to secure the Webb-Kenyon law, the evil which it attempted to remedy and the practically uniform construction of the courts of it, show clearly its purpose. It intended to and does remove from the agency of interstate commerce all intoxicating liquor which is to be *“received, possessed, sold or used in violation of any laws of the State”*. Congress properly decided that it was a wrong policy to allow the Federal Government to aid lawbreakers in nullifying the laws of the State restricting and prohibiting the liquor traffic. This Court in deciding the case of *Adams Express Company vs. Commonwealth of Kentucky*, 238 U. S. 199, well said:

"From what we have said, it follows that, before the passage of the Webb-Kenyon Act, while the state in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the state by means of interstate commerce, in certain cases."

That Congress has power to thus regulate interstate commerce is shown by the authorities in the brief in which we have filed in this case, (See pages 8 to 22) and in the brief filed by the Attorneys General of thirteen States (pp. 10-29 inclusive).

In fact, one of the cases relied on by appellants in their first brief, the Bowman case, 125 U. S. 465, is authority for this proposition:

"The state cannot exclude an article from commerce and consequently from importation simply by declaring that its policy requires such exclusion; AND YET ITS REGULATIONS RESPECTING THE POSSESSION, USE AND SALE OF ANY ARTICLE OF COMMERCE MAY BE AS MINUTE AND STRICT AS REQUIRED BY THE NATURE OF THE ARTICLE AND THE LIABILITY OF INJURY FROM IT TO THE SAFETY, HEALTH AND MORALS OF ITS PEOPLE."



This case, decided before the passage of either the Wilson or the Webb-Kenyon Acts, shows clearly what the Court would have held if Congress had taken the articles in question out of the channels of interstate commerce. The Congress has removed the obstacle preventing the enforcement of the prohibitory laws in the States. The States may now get the benefit of those laws which they have authority to enact but heretofore unfortunately did not have power to enforce. Such an anomaly never should have existed in a government whose fundamental purpose is to promote the general welfare. Now that the obstacle has been removed we cannot believe that it is in the function of this Court to replace it by judicial construction.

#### CASES DECIDED SINCE APPELLEE FILED LAST BRIEF.

Up to the time of the filing of the last brief, every State Supreme Court, Federal, Circuit Court of Appeals and all of the upper courts had sustained the constitutionality of the Webb-Kenyon law. The decisions since that time have assumed the constitutionality of the law and have given more or less of attention to the construction placed upon state laws.

#### WASHINGTON CASES.

In the case of *The State of Washington vs. John C. Eden*, decided July 5, 1916, the Court held that the law relating to the unlawful possession of intoxicating liquor applied only to liquors acquired after the act became effective. As the Court said:

“Under admitted facts in this case, the possession of liquor was lawfully acquired. It was lawfully held prior to the taking effect of this act.”

This same Court in a former decision expressed its opinion on the Webb-Kenyon law, upholding the constitutionality of the act. *Gottstein vs. Lister*, 153 Pac. 595.

Upon the petition for a rehearing in this case the Supreme Court on August 18th, held:

“All of the provisions of the law are preserved and offenders are still subject to prosecution to the same extent and for the same causes now as at any time since the law became effective.”

The only question involved in this case is whether liquors secured before the law went into effect and kept for private use were subject to seizure. The court held there was no violation of the law. That in fact the law permitted it.

### ARIZONA.

In the case of *Sturgeon vs. State*, the Supreme Court of Arizona held there was no valid state statute which had been violated by the shipment of liquor into the State for personal use. The Court made it clear, however, that the State of Arizona could pass a law prohibiting the possession of liquor and when the State had done so, such shipments would be denied the privilege of interstate commerce. *154 Pac 1050*.

### MISSOURI.

The Supreme Court of Missouri held in the case of *State vs. Mo. P. R. R. Co.*, 152 Pac. Rep. 777:

“That Congress has power to remove from the protection of the interstate commerce clause intoxicating liquors intended to be used in violation of state law.”

## SOUTH CAROLINA.

The Supreme Court of South Carolina, November Term, 1915, sustained the constitutionality of the Webb-Kenyon Act, with Justice Watts dissenting from the opinion. In the case of *Brennan vs. Southern Express Company*, the Court held:

“The constitutionality of the Webb-Kenyon act is attacked on the ground, as alleged, that it attempts to confer upon the States the power to regulate interstate commerce,—a power that was conferred by the Constitution upon Congress, and, therefore, one which Congress alone can exercise. The Title of the act is: ‘An Act divesting intoxicating liquors of their interstate character in certain cases.’ Its pertinent provisions are in substance: ‘That the shipment or transportation of any intoxicating liquor from one State into any other State, which said liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law of such state, is prohibited.’ There is nothing in the title or body of the Act upon which the attack can be sustained. The regulation is made by Congress itself in excluding from interstate commerce liquor that is intended to be received, possessed, sold or used in violation of any State law.

The power to regulate commerce includes by necessary inference the power to exclude, absolutely or conditionally, from its operations injurious things and pernicious practices, and that has been done by Congress in numerous instances, which have been sustained by the Supreme Court. *Champion vs. Ames*, 130 U. S. 321 (lottery tickets); *Hipolite Egg Co. vs. United States*, 220 U. S. 45 (adulterated foods and drugs); *Hoke vs. United States*, 227 U. S. 308 (white slave traffic).

The Wilson Act, which was of similar though less extended effect, was attacked on the same ground. It provided that liquors transported in interstate commerce should be subject to the law of the States upon arrival therein. In *Rahrer's case*, 140 U. S. 545, the Supreme Court affirmed its constitutionality as a valid exercise by Congress itself of the power to regulate commerce. In respect of being a regulation of commerce by Congress itself, it would be difficult to draw a distinction between the two Acts. . . . This brings us to the next question: Has the State power to regulate and control the personal use of intoxicating liquor by its citizens? Or, conversely stated, has the citizen the constitutional right to import liquor in unlimited quantities for personal use? The history of legislation on the liquor traffic in this and other countries abundantly shows that the power to make laws regulating or prohibiting the liquor traffic has been assumed to exist in every sovereign state, and that it has been exercised in many different ways, with the highest judicial sanction. It is true, until comparatively recent years, such legislation has been directed principally to the regulation or prohibition of sales of intoxicants. But it might have been directed to the regulation or prohibition of purchase, or it might have been made to apply to both seller and buyer. But this circumstance should not lead us from the true conception of the ultimate purpose of such laws, for certainly there is no vice in or harm that can result from the mere sale of liquors. The mischief comes of its use or abuse. The real purpose, therefore, of such legislation, except where it is solely for revenue, is to limit and control personal consumption. Such laws are founded upon the belief, which is very general, if not universal, that the unrestricted use of intoxicants is detrimental, not only to the user, but also to his family, and both directly and indirectly in many ways to the

state. The truth is, whether it be admitted or not, that liquor is the cause of many evils. It wrecks and ruins many lives, it causes much unhappiness in the homes of our people, corruption in our politics and degradation and vice and pauperism and crime. Is the social body so sorely afflicted helpless? Has the state no power to rid society of at least some of the injurious results of its use and the traffic in it?

"It has been frequently held that the State cannot, by contract or otherwise, divest itself of that undefined and undefinable power of sovereignty called the police power—the power to protect its citizens and itself, the only reason for the State's existence. This power extends to all the great public needs. *Camfield vs. United States*, 167 U. S. 518, 'It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare'. *Noble State Bank vs. Haskell*, 219 U. S. 104. That it may be exerted arbitrarily or tyrannically is denied. But that it may be reasonably exerted for the protection of society against all forms of evil, for the protection of men against the greed, avarice and other devices of each other, and even for the protection of men against themselves—against their own weakness and follies—is sustained by the highest reason and judicial authority. . . .

"It is true, as we have seen, that Congress has the power to exclude intoxicating liquors from interstate commerce, and the state the power to prohibit the manufacture and sale of it, even for personal use, what becomes of the alleged constitutional right of the citizen to obtain and drink it at his pleasure? The logical answer is that he has no such right. As said by Mr. Justice Harlan for the Court in *Champion vs. Ames*, 'If at the time of the passage of the act of 1890 (the Wilson

Act) all the states have enacted laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the states.'

"The conclusion is inevitable that the power to regulate and control the personal use of intoxicating liquor by the citizens rests with the law making body of the State—the Legislature. If the power be abused as all power to be exercised with discretion and judgment may be, the remedy is with the people. They are the source from which it is derived. But so long as the exertion of power bears a reasonable relation to a legitimate purpose sought to be accomplished, the courts may not interfere. With the wisdom and policy of legislative enactments, they have no concern. Being forbidden by the Constitution to invade the legislative domain, they cannot substitute their judgment and discretion for that of the law makers.

" 'No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.' *Mugler vs. Kansas*. Upon this principle it is held that the sale, and even the possession of things harmless in themselves may be prohibited, as a means to the accomplishment of an ulterior valid purpose. In *Purity Extract Co. vs. Lynch*, 226 U. S. 192, a statute of Mississippi, prohibiting the sale of a non-intoxicating malt liquor, was sustained. The Court said: 'That the state in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. *Bartemeyer vs. Iowa*, 18 Wall. 129; *Boston Beer Company vs. Massachusetts*, 97 U. S. 25; *Mugler vs. Kansas*, 123 U. S. 623; *Kidd vs. Pearson*, 128 U. S. 1; *Crowley vs. Christensen*, 137 U. S. 86. It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free

to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. *Booth vs. Illinois*, 184 U. S. 425; *Otis vs. Parker*, 187 U. S. 606; *Ah Sin vs. Wittman*, 198 U. S. 500-504; *New York ex rel. Silz vs. Hesterberg*, 211 U. S. 31; *Murphy vs. California*, 225 U. S. 523. With the wisdom of the exercise of that judgment the Court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature, a notion foreign to our constitutional system. In *New York vs. Hesterberg*, 211 U. S. 31 it was held to be within the police power of the state to prohibit the possession of game during the closed season, even if it was brought from without the state.

“As the legislature, in its wisdom, has by the Act of February 20, 1915, in effect declared that the unrestricted personal use of intoxicating liquors is detrimental to the public welfare, and that the receipt and having in possession of unlimited quantities of such liquors by the citizens tends to hinder and defeat the enforcement of the law against the sale thereof, and as that conclusion is based upon reasonable grounds, we must hold that the Legislature has not exceeded the limit of its power. The individual citizen must submit to reasonable restraints and inconvenience to promote the common good. *Suprema lex est salus populi*.

"The judgment of the Circuit Court must be modified to conform to the views herein announced."

The case of Seaboard Air Line Railway vs. Kenney, decided by the United States Supreme Court April 3rd, 1916, 60 Law Ed. 458, Advance Op. No. 12, issued under date of May 15th, 1916, throws light on the questions involved:

"The 'next of kin' for whose benefit an action under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149) as amended by the Act of April 5, 1910 (36 Stat. at L. 291, chap. 143) Comp. Stat. 1913 Sec. 8662), may be maintained to recover damages for the negligent killing of their intestate by his interstate railway employer, are those who are next to kin under the local law."

This act of Congress has for its constitutional sanction the commerce clause of the United States Constitution.

It has been held to be a valid and constitutional exercise of the legislative authority vested in Congress.

It creates a right of action and prescribes the manner and persons for whose benefit it may be enforced.

In doing that, as shown by the holding in the case cited, it recognizes the statutes of the various states as to who are next to kin. This "next to kin" may be and in fact is different in a number of the states.

If Congress may pass a law which depends for its vitality upon the law of the states in determining who are next of kin, then why cannot Congress pass a law taking liquors out of interstate commerce which are outlawed in the states?



The Court went much further in the above case than it is necessary for it to go in the case now under consideration.

**REPLY TO THE CONSTRUCTION PLACED BY  
APPELLANTS ON THE WEBB-KENYON ACT.**

On page 3 of Appellants' Brief they say:

"Now if the Webb-Kenyon bill did not divest intoxicating liquors of their interstate character, except in certain cases as stated by the title of the Act, I would like to inquire as to what cases it does not divest liquor of its interstate character, if the contention of the Defendant in Error in this case be true. Under the West Virginia law no shipments of liquor of any kind can be made into the State of West Virginia."

Evidently appellants have not read carefully the laws of the State of West Virginia. Section 34 of the law passed at the Extraordinary Session in 1915, provides:

"That druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections 4 to 24."

A druggist may have certain liquors shipped to him and he may sell them for legitimate purposes. The State's policy is to discourage and prevent the use of intoxicating liquor as a beverage. In order to carry out this policy ample means were provided for shipment and sale of liquor for medicinal, mechanical and other legitimate purposes, and to prevent in every way

possible the means of securing it for beverage purposes.

The Legislature of West Virginia keeping step with advancing and enlightened public sentiment *have* gradually limited the means by which liquor may be secured for beverage purposes. It is not for judicial review whether they made an error in judgment in not prohibiting an individual from carrying a specified amount of liquor with him under regulations provided in the law. The legislature evidently did not consider this a source of any great danger. They did consider it a great menace to their adopted policy of Prohibition to have it distributed generally by common carriers. They prevented this source of evil in the only legal way to do it, namely, prohibited the reception or possession of liquor by the citizens of West Virginia from such carriers. The classification and the degree of the evil sought to be remedied justified the distinction made. (See p. 76 of original brief).

Appellants claim on page 4 of their brief that someone has referred to the Webb-Kenyon Bill as an addendum to the Wilson Bill, and that no one claimed under the Wilson Bill that you could interfere with shipments of liquor for the use of the individual.

The purpose of the Webb-Kenyon Bill was to remedy the defect pointed out by appellants in the Wilson Bill, and instead of being an argument against the construction for which we contend for the Webb-Kenyon Bill, it is one of the best reasons for sustaining our contention. Evidently this Court was of the same opinion, for the reasons set forth, *supra*.

On page 6 appellants claim that the Webb-Kenyon law deals simply with the "shipment and transportation of liquor." The Act is clear on this point: it

deals with the shipment and transportation of liquor to be "received, possessed, sold or used in violation of any of the laws of the State", and any act which is incidental to or aids any such unlawful shipment may also be prohibited. We have fully set forth the reasons for this proposition on pages 78 to 79 of our original brief. See, also, pages 9 to 15 of brief filed by Fred O. Blue.

On page 8 of appellant's brief they say, "Nowhere has it ever been doubted that an individual had the right to eat and drink whatever he pleased so long as he did not exercise this right in a way to be harmful to the community at large."

The Supreme Court answered this fallacy years ago by the following decision, 137 U. S. 86:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury it is true falls upon him in his health, which the habit undermines, in his morals, which it weakens, and in the abasement which it creates. But as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

Appellant's reference to the prohibition of drinking of coffee, etc. is wide of the mark. When the drinking of coffee injures those who drink it, making many of them drunkards, criminals, paupers and delinquents, then Congress and the State Legislatures will be justified in making drastic laws to further restrict and prohibit the use of coffee. Any business or act which is a menace to the general welfare may be prohibited. No person in civilized and orderly government has any

inherent right to continue in a business, or a practice, which destroys the general welfare. Many of the shortening hours of labor and making working conditions safe are sustained on the same basis as a legislation against the liquor traffic. The health and morals of the people are essential to the perpetuity of the Government. Legislation which makes working conditions safe and helpful not only help the individual who works, but his offspring, and promotes the general welfare by creating conditions which encourage temperance and sobriety. The relation of excessive fatigue through long hours of labor and its effect on morals, health and temperance, has been set forth in an exhaustive and able brief prepared in part by His Honor Justice Brandeis, before he became a member of this Court. The whole trend of civilization by legislative act and judicial interpretation is to safeguard the public health and public morals. *laws*

That the liquor traffic is a menace to them has been proven by the records of every court, by the inmates of our state institutions for criminals, delinquents and the human wreckage of society. (See pages 6-22 to 29, brief, filed in cases 383 and 383, 1915.)

On pages 9 and 10, appellants claim that the Webb-Kenyon law did not give the State power over interstate commerce of liquor except in cases where it was to be used illegally. This is not the wording of the statute, it is:

“ . . . to be received, possessed, sold or in any manner used . . . in violation of any law of such State.”

Appellants make a violent assumption in stating that “it was never the intention to prevent the in-

dividual from securing shipments of liquor for his personal use". On pages 37 to 40 of our original brief, we have shown that the purpose of all this legislation restricting or prohibiting the liquor traffic is to discourage and prevent the use of liquor as a beverage.

#### PURPOSE OF WEBB-KENYON LAW AS SHOWN BY ITS AUTHORS AND ADVOCATES.

This court has already stated the rule for determining the purpose of the Act in the case of *Adams Express Company vs. Kentucky*, 238 U. S., page 190

"It would be difficult to form language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the State operative only where the liquor is to be dealt with in violation of the liquor law of the state into which it is thus shipped or transported."

The law itself is clear and the language is definite and certain. Any statement from the Congressional Record can be of but little if any service.

Appellant sets forth at length the statement of Senator Kenyon as to the purpose of the Webb-Kenyon Act. He also refers to statements from Dr. Dinwiddie. He claims that the statements of these sponsors for the measure show that it was never intended that the states should prohibit the use of liquor or make it impossible to secure liquor for personal use. This misunderstanding on the part of appellant arises out of the fact that the discussion turned on the purpose of the Webb-Kenyon law. This act did not prohibit the shipment of liquor to an individual for personal use

or for any other use, it simply took out of interstate commerce all liquors shipped into the State which were intended to be received, possessed, sold or used in violation of the laws of the State. Senator Kenyon stated the proposition clearly when he said:

“If liquors are shipped with the intent of being used by the person for his own personal use and in no way to violate the law of the state, then they are subjects of commerce.”

Any statement made in the heat of the debate as to what the people of the State might properly do, can be of little if any value in reaching a proper construction of this law.

Dr. Dinwiddie's interpretation of this law is concisely set forth on page 26, serial No. 1, in hearing before the Committee on the Judiciary on the Webb Bill No. 6293. He said:

“Our position is that the Congress of the United States ought to take the position of permitting the State to give full force and effect to the laws of the state. That is our whole contention. The bill of itself interferes with no man's right to import intoxicating liquors for the purpose of personal consumption. That question, in my judgment, is not involved here and it ought not to be raised here. If the state proposes to try that, and if it can be constitutionally done—if the State proposes to interfere with the personal use of intoxicating liquors, that is an entirely different proposition and under the control of the state. My position is that we do not, by these bills, raise any such question here. The state ought to have the right to do what it pleases in the operation of its police powers absolutely untrammelled by outside influences, and these men who are so anxious to

safeguard the personal liberties of the citizens of the State have full redress, because they can go into the legislatures of the states and work against the adoption of such laws, or they can work with the electorate of their States to prevent the election of legislators who would support such laws. The idea here is that the Congress of the United States should forbid the use of the instrumentalities of interstate commerce, which it exclusively controls, for the purpose of violating the laws of the state, and I am ready to defend that proposition anywhere in this country."

That any shipment of liquor into a state to be there received or possessed in violation of the laws of the state would be prohibited, is also made clear by Hon. Fred. Caldwell who had more to do with the drafting of the Webb-Kenyon law than any other person. At the hearing on interstate shipment of intoxicating liquor, Sen. Doc. 488, 62nd Cong., 2nd Sess., on the Kenyon Bill, No. 4043, at page 25, we find the following:

"Mr. Maxwell. Would you mind telling us what is the significance of this expression: 'Which is intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction'? What is all that intended to cover?"

"Mr. Caldwell. All features of interstate commerce and commerce in intoxicating liquors. If there is a loop hole for them to get out through, I did not know it at the time I drew that bill. (Laughter)."

Counsel for appellant in this case had no difficulty in determining the purpose of the measure from the person who drafted it. It was understood generally by those both inside and outside of the Congress. This

intention is further made clear by the statement of Mr. Webb, now Chairman of the House Judiciary Committee, who made clear his idea of the Webb-Kenyon Act, on February 8, 1913:

“If the states have the right, in the first place, to prohibit the personal use or receipt of liquor, this Congress has no power to take that right away from the states. On the other hand, if the state has no power under its own Constitution or the Constitution of the United States to deprive a man of the right of the personal use of liquor, then this law is harmless as to such right, because the state can never take that right from him.”

This same purpose was made manifest by the action of both House and Senate defeating amendments which would accomplish what appellant claims to be the purpose of the act. On February 10th, 1913, Congressional Record, Senate, 62nd Congress, 2nd Session, part 3, at pages 2922 and 2923, Mr. O’Gorman offered the following amendment:

“But nothing in this act shall be construed to forbid the interstate shipment of liquors herein defined into any state, territory or district where the same are intended for sacramental purposes or for the personal use of the owner or consignee thereof or for the members of his family.”

This amendment was lost. Two amendments in the House were offered, one by Mr. Bartlett of Georgia and one by Mr. Davis of West Virginia to accomplish a similar purpose. Both were voted down. Both House and Senate clearly understood that the state might enact a law prohibiting any phase of the liquor traffic even to the reception or possession of liquor and



it would be unlawful to use the channels of interstate commerce to bring liquor into such state in violation of these laws. The purpose of the act is made clear by the wording of the Act. This, of course, will determine its construction. The overwhelming testimony of the sponsors and champions of the measure affirms the construction for which we contend.

An anomalous proposition is set forth on page 10 of appellant's brief, which says: "Under the present condition of affairs, it is absolutely impossible for a dealer to do business without making himself liable to criminal prosecution in many of the states."

By what right, may we ask, has a liquor dealer in Cincinnati, New York, or Baltimore, to do business in a state where the people have prohibited the liquor traffic and the possession or reception of liquor for beverage purposes? The intent of these laws was to make it impossible for these liquor dealers to do business in prohibition territory and to punish them if they attempted to do so. It is this arrogant, law-defying spirit on the part of the liquor interests which has made it necessary to enact many of the laws of which they now complain. These laws are intended to be enforced and are being enforced, and this is the reason why appellant's clients are making such a vigorous fight against the enactment of this act which makes law-enforcement possible. As the Supreme Court of Kansas well said in the decision quoted *supra*, there is no greater champion of constitutional rights than a liquor dealer when he has been brought before a court of justice for violating the laws of the State enacted for the public good.

On page 12 a lengthy quotation is set forth in the case of *American Express Company vs. Iowa*, 196 U. S.

133. This case is no authority for appellant's contention. It was decided before the passage of the Webb-Kenyon Act and simply holds that:

"Intoxicating liquors shipped C. O. D. from one State into another state cannot be subjected to seizure under the laws of the latter state, while in the hands of the Express Company, without infringing the commerce clause of the Federal Constitution."

There can be no question about the soundness of this proposition under the laws as they existed at that time. But conditions have changed since then. New laws have been enacted and the decision does not apply.

Appellants contend on page 13 of their brief that "Intoxicating liquor has always been recognized as a fit subject of commerce."

This proves nothing: Lottery tickets were always recognized as a fit subject for interstate commerce until they were prohibited. Nearly every prohibited act is recognized as lawful until it is declared unlawful by the proper legislative body. As heretofore set forth in our first brief in this case, the people have an inherent right to better their conditions in any unit of government, small or large, when the legally constituted majority desire to do so, in the manner provided by the organic law. The courts have repeatedly held that those engaged in the liquor traffic have no inherent right to be so engaged, and they cannot complain if the traffic is abolished root and branch in a State or in the Nation. There is as little basis for their contention in this regard as in the following statement on page 13, "while it may be true that Congress may absolutely

forbid the sale or manufacture of liquor, it has not undertaken to do so, etc."

We would be very glad indeed if counsel for the liquor interests would cite the provision in the Constitution which gives Congress the right to prohibit the manufacture and sale of liquor. If Congress had such right, the present conflict which is now pending—to amend the Constitution to prohibit the liquor traffic—could be averted.

We challenge the truth of appellant's statement on page 16 of their brief, namely, that there is more "moonshine and illicit distilling going on in the southern states today than ever before in the history of the country."

The Government records disprove this statement; but if it were true, it would only be an added argument for additional legislation to deal with the law-breaking business.

We have also set forth the facts on page 62 of our original brief, which show the incorrectness of another statement on page 16 of appellant's brief, to-wit., "The Internal Revenue records show that the consumption of liquor is still as great as it ever was, even in proportion to the population."

The facts are, there was a decrease of the sale and consumption of malt and distilled liquors in 1915, of over 215 million gallons. That meant a decrease in per capita consumption of over 2 gallons,—the largest decrease in the history of the country. Even the liquor dealers are waking up to the fact that prohibition laws can be enforced when Federal interference has been removed by Congress.

The specious plea of appellants "that an article recognized from time immemorial as an article of com-

25

merce cannot be kicked around like a football in this outrageous manner", should be addressed to the State Legislatures and to Congress, and not to the Court.

In fact every argument which genius can devise has been addressed to these legislative bodies. The claims and arguments of the liquor dealers have been weighed and found wanting. Advancing civilization has come to the point where it is too good to tolerate the beverage liquor traffic much longer. Every liquor dealer in the United States went into the liquor business knowing that the people had the right to prohibit the traffic, and he assumed that risk in engaging in this business which produces crime and misery in society. Science, industry, fraternal organizations, public health departments, life extension societies, and every agency for human uplift, has raised a hand against the beverage traffic. The legislative department of government to which is entrusted the right to determine questions of public policy relating to evils, have acted in response to the public sentiment and enlightened public conscience of the people, and it is not for the judicial department of government to set aside their action.

W. B. WHEELER,  
*Of Counsel for the State  
of West Virginia.*

Office Supreme Court, U. S.

**FILED**

**FEB 19 1916**

**JAMES D. MAHER**

**CLERK**

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**SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1915.**

No.  984.

**76**

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and the State of  
West Virginia.

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**Appeal from the District Court of the United States  
for the District of Maryland.**

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**BRIEF FOR APPELLANT ON RE-ARGUMENT.**

---

Lawrence Maxwell,  
Joseph S. Graydon,  
Walter C. Capper,  
J. Phillip Roman,  
Counsel for Appellant.

**SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1915.**

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**No. 384.**

---

The James Clark Distilling Company, Appellant,  
vs.  
The American Express Company and the State of  
West Virginia.

---

**Appeal from the District Court of the United States  
for the District of Maryland.**

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**BRIEF FOR APPELLANT ON RE-ARGUMENT.**

---

We submit that every question arising in this case prior to the amendment of the law of West Virginia by the Act of May 24, 1915, was substantially decided by the court in *Adams Express Company vs. Commonwealth of Kentucky*, 238 U. S. 190 (June 14, 1915); and that only the effect of that amendment requires additional consideration.

The bill (R. 7) sought to compel the carrier to transport for plaintiff, in interstate commerce, liquors ordered by plaintiff's customers in West Virginia for their personal use. The original decree of the court below (R. 40) granted that relief, but imposed upon

the carrier the obligation that it should in good faith and in so far as it was reasonably able to do so, ascertain from the shipper whether the liquors were intended for personal use of the consignee, or whether they were intended to be used by the consignee in violation of the law of West Virginia; and to exercise the same good faith and care respecting deliveries to consignees, and where it appeared that the shipments were not intended for personal use, that they should not be accepted or delivered as the case might be. The final decree (R. 44) vacated the original decree and dismissed the bill. We contend that the original decree was correct and should be reinstated.

## II.

In *Adams Express Co. vs. Kentucky*, 238 U. S. 190, the Kentucky statute made it unlawful for the carrier to bring an interstate shipment of liquor into, or deliver the same in any county where the sale of liquors was prohibited; and further provided that the place of delivery of such liquors should be held to be the place of sale. The Adams Express Company violated this statute. It appeared that the consignee intended the liquor for his personal use and that such use of liquor was not a violation of the law of Kentucky. The court said, at p. 202:

“It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the State of Kentucky, as such laws are construed by the

highest courts of that State, the Webb-Kenyon Law has no application and no effect to change the general rule that the states may not regulate commerce wholly interstate."

Prior to the former argument of this case, on May 10, 1915, the law of West Virginia was in respect to the issues involved here not substantially different from the law of Kentucky. It provided in section 3 (original act of February 11, 1913) that "in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, etc." And in section 7 as amended (Act of January 29, 1915) it provided "that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use, etc." The right of the citizen to personally use liquors and have them in his possession for that purpose is expressly recognized in sections 7 and 31 of the statute as amended in 1915, and is not denied by any act of the legislature. That right as upheld in *State vs. Gilman*, 33 W. Va. 146, is as effectively established in West Virginia as it is in Kentucky by the decisions of the highest court of that state, to which this court referred in *Adams Express Co. vs. Kentucky*. It therefore follows that the construction of the Webb-Kenyon Law adopted by this court in the Kentucky case has only to



be applied in this case to laws of the state of West Virginia which are not substantially different from the laws of Kentucky.

### III.

It remains to consider whether any new issue is imported into the case by the amendment to the law of West Virginia adopted at the extraordinary session of 1915, and incorporated into the statute as section 34. That section provides:

“It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier.

It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four.” Passed May 24, 1915, effective August 22, 1915.

There is nothing in this section, nor in any other section of the statute, which makes it an offense for the

citizen to have in his possession for personal use and to use intoxicating liquors. In fact the right to have and use liquors where the citizen has personally secured them outside the state is expressly recognized by section 31 (c. 7, Acts of 1915), which provides that it shall be a misdemeanor—

“for any person to bring or carry into the state, or from one place to another within the state, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the side or top of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kinds of liquor contained therein.”

In *State vs. Sixo*, 87 S. E. 267, decided by the Supreme Court of Appeals of West Virginia, November 30, 1915, the court, construing this section in a case where defendant brought into Monongalia County, West Virginia, for his personal use, two quarts of whisky, two quarts of rum, and four pints of beer, said:

“This statute does not prohibit a person from having in his possession liquors for personal use, when properly marked or labeled.”

Referring to section 7, as amended by chapter 13 of the act of 1915, the court said:

“Under this proviso, a person may lawfully have intoxicating liquors in his home for personal use, subject to the restrictions named.”

And further, that—

“Any one has the right to keep intoxicating liquors in his home for personal use, and, having the right to keep them, he must have the right to take them there, under reasonable regulation; and, if the state has reason to believe that such liquors are being kept as a shift, scheme, or device to evade the provisions of this act, the burden, in the first instance, is on the state, by some proper evidence, to show this.”

The state law therefore recognizes the right of the citizen to use and have liquors, but undertakes, by section 34 (ante p. 4), to make it an offense for him to receive liquors which he has purchased in another state for such lawful use, from an interstate carrier, and to have in his possession liquors so received. It is not the use or possession of liquors which is forbidden, but their **transportation** in interstate commerce. A state law which prevents the sale of liquors within the state is a police measure. A state law which undertook to make the possession and use of liquors in the state illegal would also be a police measure, even though it might be invalid because in conflict with the Fourteenth Amendment. But a state law which makes it an offense to receive from a carrier in interstate commerce, liquors intended for lawful personal use, and at the same time permits the individual to purchase liquors, carry them to his home, keep them there for personal use and use them, is not a police measure; it is a direct regulation of commerce, not authorized by

the Webb-Kenyon Law or by the commerce clause of the Federal Constitution.

In *Adams Express Company vs. Commonwealth of Kentucky*, 238 U. S. 190, Mr. Justice Day, after stating the terms of the Webb-Kenyon Act, said, at p. 199:

“It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the state wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the Act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution.”

## IV.

It is contended by the State that plaintiff's shipments are contraband because, in part at least, they are made for the purpose of filling orders which were secured by advertising and solicitation, forbidden by section 8 of the Yost Law. *State vs. Davis*, —W. Va.—, 87 S. E. 262 (Supreme Court of Appeals of West Virginia, November 30, 1915), is relied on to support the contention. In sustaining a conviction in that case the court said:

“If orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the state, such sale would be a violation of the statute, and be covered by the Webb-Kenyon statute. So we conclude, in view of the interpretation of the Wilson Act, that this latest federal statute supplementing that act has so far removed restrictions upon state action as to validate the provisions of the Yost Law in question, and that defendant is guilty as charged.”

The conclusion of the court that such advertisements could result in a sale which would be a violation of the West Virginia law was based upon the provision of section 3 thereof undertaking to make the place of delivery the place of sale, where liquors are shipped over the lines of a common carrier, and it was accordingly held that such “a sale” was in violation of the statute “whether such liquors were intended for the personal use of the purchaser or not.” But, as decided

in *Adams Express Co. vs. Kentucky*, the state of West Virginia has no power, in the case of interstate shipments for lawful, personal use, to make the place of delivery the place of sale.

*Delamater vs. South Dakota*, 205 U. S. 93, is not in point. We referred to that case in our original brief at page 29, and also to the case of *Rose vs. State*, 133 Ga. 353, which points out the distinction between the *Delamater* case, where the solicitation of orders was personally carried on by the agent of the non-resident liquor dealer within the state of South Dakota, and the present case where it is carried on through the mails.

The soliciting of orders for the sale of liquors to be shipped in interstate commerce is beyond question an incident of commerce. In the *Delamater* case it was held to be an incident which the states by the provisions of the Wilson Act had jurisdiction to control, where the soliciting was carried on as a business solely within the borders of the state. But it does not follow that under the Wilson Act the control over such an incident of commerce is within the jurisdiction of the state, when the business is carried on in two states. In that case it is a transaction which in its very nature requires to be governed by laws apart from the laws of the several states. Nor does the Webb-Kenyon Act confer upon the states any more extensive jurisdiction in this respect than they had under the Wilson Act, unless the shipments are brought within the terms of the Webb-Kenyon Act by showing that the "liquor is

to be dealt with in violation of the local law of the state into which it is shipped or transported." That is not this case. The liquors here involved are not to be "possessed, sold or used in violation of any law of the state wherein they are received," but in accordance with its constitution and laws as construed by the highest court of the State.

We respectfully submit that the decrees in this case and in No. 383 dismissing the bills should be reversed, and the cases remanded with directions to reinstate the original decree in each case.

Lawrence Maxwell,  
Joseph S. Graydon,  
Walter C. Capper,  
J. Phillip Roman,  
Counsel for Appellant.

Office Supreme Court, U. S.

FILED

FEB 21 1916

JAMES D. MAHER

CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1915.

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<sup>75</sup>  
**No. 383**

THE JAMES CLARK DISTILLING COMPANY,  
APPELLANT,

VS.

THE WESTERN MARYLAND RAILWAY COMPANY  
AND THE STATE OF WEST VIRGINIA,  
APPELLEE.

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<sup>76</sup>  
**No. 384**

THE JAMES CLARK DISTILLING COMPANY,  
APPELLANT,

VS.

THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA,  
APPELLEE.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MARYLAND.

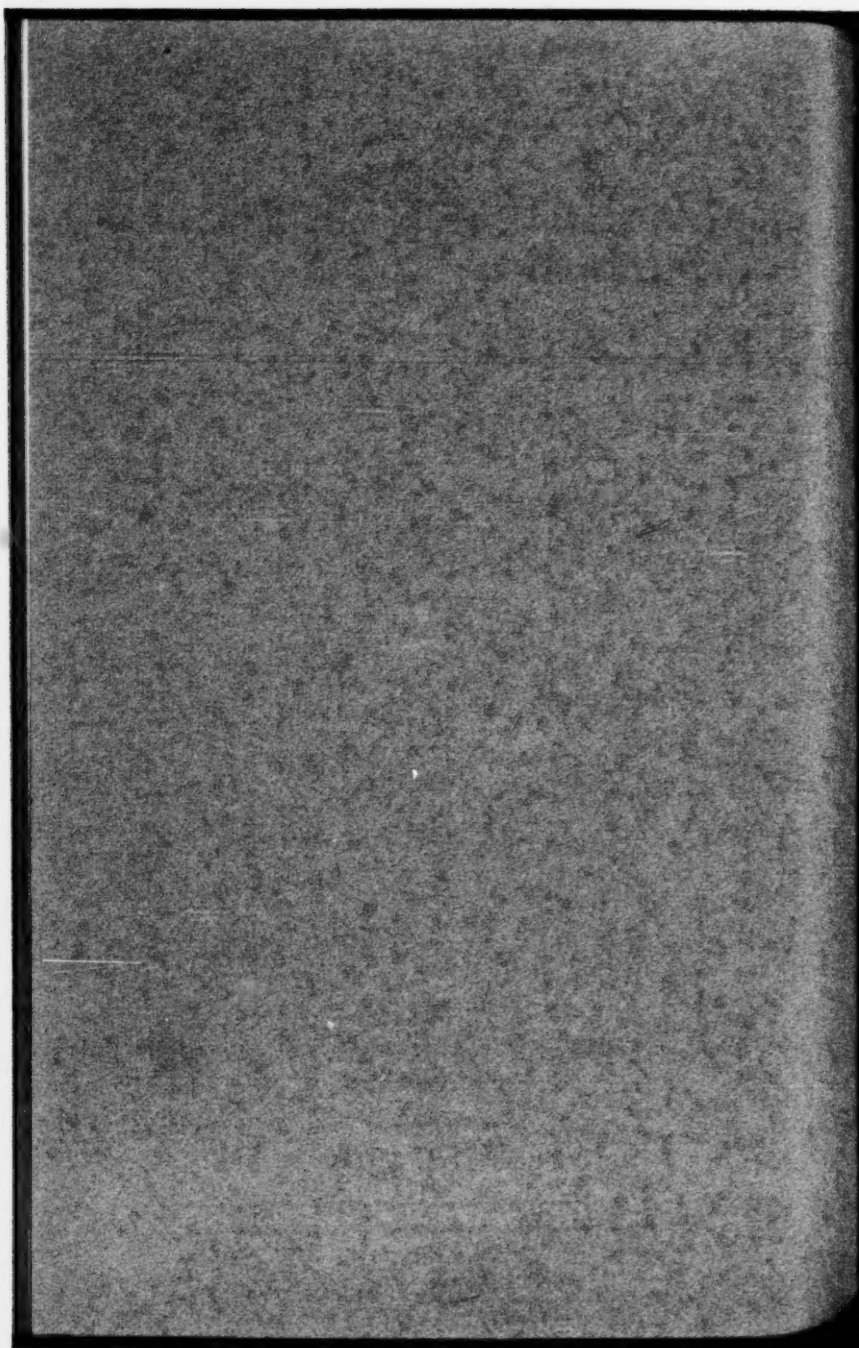
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BRIEF FOR THE STATE OF WEST VIRGINIA,  
APPELLEE.

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W. B. WHEELER,  
*Of Counsel for the State of West Virginia.*





# INDEX

## QUESTIONS PRESENTED IN BRIEF.

Constitutionality of Webb-Kenyon Law.

Constitutionality of Law of West Virginia.

## WEBB-KENYON LAW.

	Page
Webb-Kenyon Law authorized by Federal Constitution	8
Cases sustaining law .....	9
Congress has not delegated legislative power .....	10
Congress has power to prohibit deleterious commodities	12
Articles prohibited through interstate commerce....	14, 15
Commerce in outlawed liquors .....	15
Intoxicating liquor a deleterious commodity.....	22
Congress may prohibit entirely or do less.....	29
Possession and reception of liquor not constitutional guarantee .....	32
Purpose of prohibition legislation to minimize use....	37
Webb-Kenyon Law as police regulations.....	40
Innocent acts may be prohibited to prevent admitted evil	43
Cases cited by appellant distinguished .....	47
Purpose of Webb-Kenyon Law .....	52
Presumption as to constitutionality .....	57
Protection of public morals a necessity.....	60

## CONSTITUTIONALITY OF LAW OF WEST VIRGINIA.

Laws prohibiting possession and reception of liquor valid under police power .....	64
Police power of West Virginia.....	64
Constitution of West Virginia.....	69
Laws protecting public health and morals.....	70
Possession and reception of liquor prohibited.....	71

	Page
The law has a reasonable relation to the purpose to be accomplished .....	70, 71
State may classify objects under police power.....	76
West Virginia laws provide proper classification.....	77
Transactions accessory to evil may be prohibited.....	78
West Virginia Courts sustain legislation involved.....	80

## INDEX OF CASES

	Page
American Express Co. vs. Beer, 65 Sou., 581.....	30
American Express Co. vs. Iowa, 196 U. S., 133.....	54
Atkinson vs. Southern Express Co., 94 S. C., 44.....	9
Addyson in re. 175 U. S., 211.....	41
Adams Express Co. vs. Commonwealth, 169 S. W., 603..	9
A. T. & S. F. R. Co. vs. Matthews, 174 U. S.....	58
Beebe vs. State, 6 Ind., 542.....	24, 68
Beer vs. Mass., 97 U. S., 33.....	65, 68
Booth vs. Illinois, 184 U. S.....	46
Bowman vs. Northwestern, 125 U. S., 500.....	52
Brown vs. Walker, 161 U. S.....	58
Buttfield vs. Stranahan, 192 U. S., 470.....	14
Canfield vs. U. S., 167 Rep., 518.....	41
Champion vs. Ames, 188 U. S., 356.....	18, 56
Commonwealth vs. Brelsford, 161 Mass.....	45
Commonwealth vs. Campbell, 133 Ky.....	47
Crowley vs. Christensen, 137 U. S., 86.....	23, 46, 68
Delameter vs. South Dakota, 205 U. S., 93.....	52, 80
Dinkins vs. State, 149 Ala., 49.....	45
Eidge vs. Bessemer, 164 Ala., 599.....	33, 47, 49
Ex parte Crane, 151 Pac. Rep.....	38
Elder vs. State, 162 Ala., 41.....	45
Engel vs. O'Malley, 219 U. S., 128.....	76
Feibleman vs. State, 149 Ala., 49.....	45
Foster vs. Kansas, 112 U. S., 201.....	68
Gibbons vs. Ogden, 9 Wheat. 1.....	59
Giozzo vs. Tiernan, 148 U. S., 657.....	67, 77
Glenn vs. Southern Exp. Co. 473 6. 136.....	9, 79
Goddard vs. The Town of Jacksonville, 15 Ill., 589...	24, 68
Gottstein vs. Washington .....	9

	Page
Heath Mfg. Co. vs. Worst, 338, 207 U. S.	76
Hippolite Egg Co. vs. U. S., 45	15
Hoke vs. State, 227 U. S., 309	42, 63
Hooper vs. California, 155 U. S., 648	80
Kansas vs. Missouri Pac. Ry.	15
Kidd vs. Pearson, 168 U. S., 1	46, 68, 76
Lincoln vs. Smith, 27 Vt., 320	39, 70
Louisville & N. R. R. Co. vs. Melton, 218 U. S., 36	76
Marks vs. State, 169 Ala., 71 at page 84	39, 70
Meager vs. Crima, 8 Howard, 490	76
Mugler vs. Kansas, 123 U. S., 623	23, 33, 46, 51, 68
New York vs. Hesterberg, 211 U. S., 31	49
New York ex rel Hatch vs. Reardon, 204 U. S., 162	72
Ohio ex rel Dollison, 194 U. S., 445	30
Our House No. 2 vs. The State, 4 Freem. (Iowa) 172	68
Patson vs. Pennsylvania, 332 U. S., 138	49, 72
Pennell vs. State, 123 N. W. Rep., 115	45
Phalen in re., 8 Howard, 161	42
Preston vs. Drew, 33 Me., 558	33
Purity Extract Co. vs. Lynch, 226 U. S. at 201	45, 48, 85
Rahrer in re., 140 U. S., 562	12
Reid vs. Colorado, 189 U. S., 137	14
Rhodes vs. Iowa, 170 U. S., 412	53
Ripey vs. Texas, 193 U. S., 504	30
Santo et al vs. State, 2 Iowa, 165, 190	68
Southern Express Co. vs. State, 66 So. Atl., 115	9
Southern Express Co. vs. Whittle	9, 34, 40, 49, 74
Southern Express Co. vs. Beer, 65 So., 575	9
State vs. Crawford, 42 Am. Rep., 186	25, 68
State vs. Davis, 2864 W. Va.	49
State vs. Delaye, 68 S., 996	39, 52, 81
State vs. Doe, 137 Pac. (Kas.), 1169	9, 32
State vs. Frederickson, 101 Me., 37	44, 45
State vs. Gilman, 33 W. Va., 146	38, 47, 84
State vs. High Point, 83 S. E., 254	34
State vs. Intoxicating Liquor, 76 Iowa, 243	45
State vs. Kansas, 80 Pac. Rep., 989	26, 68

	Page
State vs. Maine, 20 L. R. A., 496.....	38
State vs. Phillips, 67 So., 651.....	40, 48, 52
State vs. Piche, 98 Maine, 348.....	45
State vs. Sixo, No. 2895, W. Va.....	47, 83
State vs. U. S. Express Co., Sup. Ct. Iowa, 145 N. W. Rep., 551 .....	11
State vs. S. A. Ry. Co., 84 Sou., 283.....	9
State vs. Walder, 83 O. S., 68 at page 84.....	45
State vs. Williams, 146 N. C., 618.....	38, 51
United States vs. Cohn, 32 S. W. Rep., 38.....	44, 45
United States vs. Gettysburg Elec. Co., 160 U. S., 668. .	19, 58
United States vs. 43 Gallons Whisky, 93 U. S. 188. ....	14
United States vs. Harris, 106 U. S., 635.....	57
United States vs. Knight, 156 U. S., 325.....	54
United States vs. Oregon, 210 Fed. 378.....	9
Taylor vs. Commonwealth, 853 E. Rep., 499.....	9
Vance vs. Vandercook Co., 170 U. S.....	53
Van Winkle vs. State, 91 Atl. (Del.), 385.....	9
Williams vs. State, 179 Ala., 50.....	47
West Virginia vs. Adams Express Co., Fed. Rep. vol. 219, No. 4 .....	9, 53

NOS. 383-384.

# Supreme Court of the United States

OCTOBER TERM, 1915.

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THE JAMES CLARK DISTILLING CO.,  
Appellant.

vs.

THE WESTERN MARYLAND RAILWAY CO.,  
and THE STATE OF WEST VIRGINIA,  
Appellees.

---

THE JAMES CLARK DISTILLING CO.,  
Appellant.

vs.

THE AMERICAN EXPRESS CO. AND THE STATE  
OF WEST VIRGINIA  
Appellees.

Brief for the State of West Virginia.

## STATEMENT OF THE CASE

These cases were heard in the October term, 1914, along with the case of the Adams Express Co. v. The Commonwealth of Kentucky. They were re-docketed for hearing without any motion for re-hearing having been filed. The court did not indicate any particular point on which the cases were to be re-argued. They will be briefed therefore as for an original hearing.

The construction of the West Virginia law and the state prohibition amendment of West Virginia have been fully discussed in a very able brief by Honorable Fred O. Blue, State tax and prohibition commissioner of West Virginia. In the brief which we submit

\* Blackface and capitals in this brief supplied.

herewith we confine ourselves to two propositions which are involved in this case.

First, Is the Webb-Kenyon law constitutional?

Second, Has the State of West Virginia the authority to enact the legislation involved, to-wit:

To prohibit the possession and receipt of intoxicating liquor for beverage purposes, from a common carrier.

## CONSTITUTIONALITY OF WEBB-KENYON LAW

### I

#### POWER OF CONGRESS TO ENACT LAWS REGULATING INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Article 1. Section 8, clauses 3 and 18, set forth the power of Congress to enact laws regulating interstate commerce. They read as follows:

"To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

"To make all laws which shall be necessary and proper for carrying into execution the power given."

#### THE WEBB-KENYON LAW IS AUTHORIZED BY THE FEDERAL CONSTITUTION.

The Webb-Kenyon law has been sustained by five courts of last resort since the last hearing on these cases. The validity of the law or its application to the facts have been considered in many courts. In three instances the courts did not pass directly upon the constitutionality of the law. The Court of Appeals in Kentucky, 154 Kentucky 462, held that the facts did not constitute a violation of a valid state law. The Supreme Courts of Tennessee and Delaware reached a similar conclusion in the cases before them, namely, that the shipments were for a lawful purpose and therefore did not come under the provisions of the Webb-Kenyon law. In no case has a Court of last resort held that the Webb-Kenyon law was unconstitutional. On the other hand this law has been declared con-



stitutional and valid by every State Supreme Court, the United States Circuit Court of Appeals and all of the upper courts in the State and Federal government which have passed upon its constitutionality.

Glen vs. Southern Exp. Co. N. C., decided Dec. 1, 1915.

Southern Express Co. v. State, 66 So. Rep. 115.

Southern Express Co. v. Whittle (Ala.) 6950 South Rep. 652.

West Va. v. Adams Ex. Co. (C. C. A.) 219 Fed. 794.

State v. S. A. L. R'way (N. C.) 84 S. 283.

State v. Doe (Kansas) 139 Pac. 1169.

Kans. vs. Mo. Pac. Ry.

State v. Express Co. (La.) 145, 451.

Sou. Express Co. v. Beer (Miss.) 65 South 575.

United States v. Oregon & W. R. & N. Co. 210 Fed. 378.

Atkinson v. Sou. Ex. Co. 945 C. 444, 78 S. E. 516  
45 L. R. A. (N. S.) 349.

Van Winkle v. Delaware, 91 Atl. 385.

Gottstem v. Washington, decided December 12, 1912.

Tailor vs. Commonwealth, 85 S. E. Rep. 499.

The court of last resort in Kentucky on November 4, 1915, in the last case before it, Adams Express Company v. Com. (Ky), 169 S. W. 603, held:

"The Webb-Kenyon Act puts beyond the protection afforded interstate commerce any intoxicating liquor shipped into the state to be sold or in any manner used, in violation of the laws of the state."

The court cited most of the above cases as authority for their decision.

This court in the recent case of Adams Express Company v. Kentucky, October term, 1914, said:

"The Constitution of the United States grants to Congress authority to regulate commerce among the States to the exclusion of State control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the

Constitution itself. \* \* \* Before the passage of the Webb-Kenyon Act, while the state in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there is nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the State by means of interstate commerce."

This Court has repeatedly held in an unbroken line of decisions from *Gibbons v. Ogden*, 9 Wheaton, page 1, down to the last case before this Court, involving this question that there is no limitation on Congress in regulating interstate commerce except what is found in the Constitution itself. There is no provision in the Constitution which prohibits Congress from enacting a measure like the Webb-Kenyon law.

#### THE LAW IN QUESTION IS NOT A DELEGATION OF LEGISLATIVE POWER

It is the theory of those who oppose this law, that Congress has delegated some power to the State to regulate interstate commerce. Under the plenary power of Congress to regulate interstate commerce, this law provides that the protection of interstate commerce shall be denied to intoxicating liquors which are shipped from one State to another when such liquors are to be received, or possessed, or used in violation of the State law. This is not a delegation of power, it is an absolute exercise of the power of Congress. It does not prohibit all liquors from the channels of interstate commerce, but simply those which are transported, received, possessed or used in violation of the laws of the State. If it be conceded that all

liquors may be denied the privilege of interstate commerce, then it follows that the shipment of these which are in violation of the law, may be denied the privilege of interstate commerce.

An illuminating discussion on this point is found in the decision of the Supreme Court of Iowa, *State vs. U. S. Express Company*, 145 N. W. Rep. 351:

"There are no words of delegation in the act itself, and the theory of it is that liquors intended for use, contrary to State rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the State is interfering with interstate commerce, for the reason that **right of such shipments between the States is denied by Federal legislation.** It is true that the effect of the act is to give the States more power, but there is no such express delegation and the language of the act is in no sense permissive. The act is prohibitory in character and acts not upon States but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation.

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confined to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it has already had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

"Congress may say the power to engage in interstate or international commerce shall not be understood as permitting anybody to sell opium or intoxicating liquors to anyone else, and that they shall be excluded altogether from the domain of interstate commerce. That Congress has a right to

say \* \* \* That is not a question of delegated power. It is not a question of permission to the State. It is a question of the right of Congress to prescribe what shall be the limit of interstate commerce."

See also cases cited *supra*.

Congress does not delegate power to the states to regulate interstate commerce, but Congress itself prohibits the facilities of interstate commerce to all liquors outlawed in the states under the police power. It was decided in *Hill vs. Hesterberg*, 184 N. Y. 126 at 132:

"That Congress can authorize an exercise of police power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in *Re Rahrer* 140 U. S. 545."

Congress released its control over liquor shipped by interstate commerce under the Wilson Law upon arrival. This gave the States some relief in the enforcement of their laws. The Webb-Kenyon Act goes one step further and prohibits all shipments of liquor into a State for a purpose prohibited by State law. In neither case is there a delegation of power, but there is a proper use of power concurrently by the State and Federal governments within their respective jurisdictions in dealing with a recognized evil.

#### CONGRESS HAS POWER TO ELIMINATE DETRIMENTAL COMMODITIES FROM INTER-STATE COMMERCE

It is a mooted question how far Congress may go in regulating or removing useful commodities from the channels of interstate commerce, but there is ample authority for the proposition that any article of commerce which is detrimental to public morals may be eliminated from commerce entirely.

The Supreme Court recognized this principle of legislation when it upheld the action of Congress forbidding the

interstate traffic in lottery tickets in the following language, 188 U. S. 356:

"We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is in effect a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode of regulation of that particular kind of commerce? \* \* \* In determining whether regulations may not under some circumstances properly take the form of or have the effect of prohibition, the nature of the interstate traffic which it has sought to suppress cannot be overlooked.\* \* \* But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to public morals.\* \* \* In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lottery tickets, as well as the sale or circulation of lottery tickets, within their respective limits. It is said, in effect, that it would not permit the declared policy of the States which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

"If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another,

"The title is—'An Act divesting intoxicating liquors of their interstate character in certain cases.'

\*\*\* Congress has, therefore, undertaken to divest of its interstate character all intoxicating liquor shipped into a State to be used for an unlawful purpose—that is, for a purpose made unlawful by any law of such State. When the law of a given State makes it a crime to sell intoxicating liquor, Congress intends that any liquor shipped in for the purpose of violating such statute shall be divested of its interstate character and that all the protection incident to such character shall be removed from it.

"This brings us to the vital question on which will hang all the law of the prophets of this conviction, namely; whether the power granted to Congress by the Constitution to regulate interstate commerce includes the authority thus to divest a given commodity of its interstate character.

"In considering this most important and far-reaching problem it is one thing to regard its solution as a logical deduction to be drawn mechanically from the language of the Constitution and another thing to account this a serious, deliberate attempt by the law-making power of the nation to obey the very spirit of the Constitution itself framed for the professed purpose of insuring domestic tranquility and promoting the general welfare. The citizen, who driving close to the brink, passes the danger line and finds himself in the wrecked condition brought about by transgressing the law, will search with eagerness for some solace and protection in the great fundamental charter whence the body which enacted the law derived its power. Under these circumstances the searcher asserts with vehemence the rights of the individual as against the assumed corrective power of the State itself, and the immortal blessings of personal liberty find no greater champions or more eloquent eulogists than those who are accused of violating statutes prescribed for the government of their conduct. It may be said, however, that constitutions are not framed and adopted for the special benefit of those who disregard or stretch to the breaking enactments intended for the enhancement of the public peace and welfare, but for the good of the citizenship at large, and the protection of higher

things of real value to humanity which make life worth living. **Civil conditions cannot remain stationary and unless they retrograde they must advance,** and when the law-making power of the nation upon serious thought and careful deliberation, enacts a statute manifestly and unmistakably intended to promote the public health and morals and happiness it must be presumed, until the contrary is clearly shown, that it acted within its lawful province and power. Let us see, then, whether liquors shipped into a state for the purpose of violating its statutes can be divested of their interstate character in the exercise of Congress of its power to regulate interstate commerce. \* \* \*

"In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to those new conditions.

"As said by a brilliant and well-known member of the legal profession:

"\* \* \* The Constitution our fathers made had the marching quality in it; \* \* \*'

"It has been supposed by some students of our national history that a written constitution is an inert mass of tabulated provisions. The supposition is not correct; **for the national Constitution, under the guidance of our great court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of 'progressing history.'** This does not mean that a written Constitution grows by being violated whenever its provisions stand in the way of national progress; but it does mean that our Constitution was, by the enlightened foresight of its framers, made to be an intelligent guide and chart, not a mere list of obstacles. (George R. Peck, Reports of American Bar Association, 1900, Vol. 23, pages 256 and 275.)



"We now see the great end which they proposed to accomplish. It was to frame, for the consideration of their constituents, one Federal and national Constitution—a Constitution that would produce the advantages of good, and prevent the inconvenience of bad government—a Constitution whose beneficence and energy would pervade the whole Union, and bind and embrace the interests of every party, a Constitution that would insure peace, freedom and happiness, to the States and people of America." (Lectures of James Wilson, Vol. I, p. 542.) "Although Congress cannot authorize a State to legislate, it may adopt State legislation; it may divest designated articles of their interstate commerce character and subject them to the operation of State laws \* \* \*." (Sutherland's Notes on United States Constitution, p. 79.)

"That the power to regulate includes the power to prohibit the interstate transportation of at least certain classes of commodities has been placed beyond question by the decision of the court in *Champion v. Ames*." (188 U. S. 321.) (Willoughby on the Constitution, Vol. 2, Sec. 347.)

"A writer of great legal experience and ability, in speaking of the power of Congress to regulate commerce, said: 'Having ascertained, then, what commerce is, and what are some of its elements, which may be the subject of the action of Congress, or of the attempted action of the States, we next come to consider what it is to regulate commerce. \* \* \* Commerce being intercourse and traffic between people, to regulate it is to prescribe rules by which it shall be conducted.' (Miller on the Constitution, p. 449.)

"In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, Mr. Justice Field in delivering the unanimous opinion of the court, said (p. 203):

"Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations vested in Congress is the power to prescribe the rules by which it shall be governed, that is the conditions upon which it



shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.' At page 215, the court quotes with approval from Judge Cooley, (Cooley's Constitutional Limitations, 732), to the effect that Congress may descend to the most minute directions of interstate commerce and may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution.

"In *United States v. Gettysburg Electric Ry. Co.* 160 U. S. 668, the act of August 1, 1888.

"'An act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by Congress, must be valid.' (p. 429.)

"Again:

"'Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of the battle, in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. \* \* \* No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and any inference from them all may be drawn that the power claimed has been conferred.' (p. 430.) \* \* \* 'For it is of as much national importance to make men sober as to make them patriotic.' In the case of *In Re Rahrer*, 140 U. S. 545, holding constitutional the Wilson bill which removed from interstate shipments

is it logically inconsistent with plenary power to regulate the traffic in such commodity between the States, because it is now the settled doctrine of the Federal courts that interstate commerce is a subject on which primarily Congress alone may legislate and of which it alone has jurisdiction and concerning which the State may not assume to act except incidentally whether Congress sees fit to act or not. The inevitable corollary of this doctrine is that Congress possesses over this subject power so ample and so complete that it may well remove from a commodity otherwise legitimate its interstate character and protection whenever its movement in interstate commerce is for the accomplishment of an unlawful purpose—the violation of the laws of one of the sister States of the Union. Those who contend for the invalidity of the act must base their reasoning on the slender platform that intoxicating liquor when transported for the purpose of violating a State statute is by some subtle constitutional alchemy of the same national importance and entitled to the same governmental protection as if it were brought into the State for the most beneficent purpose imaginable. We deem this line of argument and the conclusion resulting therefrom opposed to the true doctrine of constitutional interpretation and to the spirit expressed by the framers of the Constitution when the preamble was formulated."

**ALCOHOL OR INTOXICATING LIQUOR USED AS A BEVERAGE IS A DELETERIOUS COMMODITY AND MAY BE EXCLUDED FROM INTERSTATE COMMERCE.**

Science has demonstrated and governments of the world have officially recognized these facts about intoxicating liquor.

Alcohol, or intoxicating liquor, is a poison to all life, plant and animal.

At the International Congress on Alcoholism in London in 1909 where many well-recognized and well-known scientific men and medical leaders from all the great nations were in attendance, the following statement defining the

nature of alcohol was drafted and signed by large numbers of these leaders:

"Exact laboratory, clinical and pathological research has demonstrated that alcohol is a dehydrating protoplasmic poison, and its use as a beverage is destructive and degenerating to the human organism. Its effect upon the cells and tissues of the body are depressive, narcotic and anaesthetic. Therefore, therapeutically its use should be limited and restricted in the same way as the use of other poisonous drugs."

The committee of fifty-one which determines what drugs and narcotics shall be recognized as medicine in the United States Pharmacopoeia have decided, beginning with January, 1916, whisky and brandy shall no longer officially be recognized as a medicine in the United States Pharmacopoeia. These cold-blooded scientists have reached the conclusion that even as a stimulant for medical purposes, it is a failure. The after-effects are so deleterious that other stimulants which are not followed by these evil results should be substituted.

Alcohol penetrates the nerve fibers like chloroform and is a deceptive, habit-forming drug, injuring the drinker and those dependent upon him for support.

This court said in the case of *Crowley v. Christensen*, 137 U. S. 86:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in the abasement which it creates, but as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

See *Mugler v. Kansas*, 123 U. S. 623:

"But surely it will not be said to be a part of anyone's liberty, as recognized by the Supreme Court

times as much in free drinkers and three to fifteen times as much in excessive drinkers compared with abstainers."

Insurance companies give us indisputable facts that the use of liquor shortens the drinker's life. Arthur Hunter, Chairman of the Central Bureau Medico-Actuarial Mortality Investigation, December, 1914, reported statistics gathered from two million lives. It showed that among the men, whose habits were considered satisfactory, but were drinkers of alcoholic liquors, the death rate was fifteen to a thousand, where the death rate would only have been ten had alcoholic liquors not been used. He also stated that the data gathered from these two million lives showed men whose average age was 35, would as total abstainers have an expectancy of life for 32 years more, but the liquor habit had caused a deduction of more than four years.

In *State v. Kansas*, 80 Pacific, at page 989, the court says:

"The commodity in controversy is intoxicating liquors. \* \* \* but the article is one whose moderate use, even, is taken into account by actuaries of the insurance companies, and which bars employment in classes of service involving prudent and careful conduct, an article conceded to be fraught with such contagious peril to society that it occupies a different status before the Courts and the Legislature from other kinds of business."

The Mortality Statistics published by the Census Bureau of this Government clearly demonstrate the deleterious character of the commodity in question and the necessity for Federal legislation, which will safeguard and protect our people from the evil effects arising from the use of intoxicating liquors.

It is a fact within the common knowledge of all that the male population is more addicted to the use of intoxicating liquors than the female population. The result of this use of intoxicating liquors of the male population in excess of the use thereof by females is written by the hand of death in our Mortality Statistics.

While the male and female population are practically the same, the number of deaths of the two divisions are widely different, and this difference is becoming greater and greater as the years go by.

In order that the Court may fully understand the serious consequences resulting from the use of intoxicating liquors by our people, we attach a table taken from the Mortality Statistics, published by the Census Bureau for the years 1906, 1908, 1910, 1912 and 1913, being the last year for which we could obtain these figures showing the number of deaths of males and females, and total number of deaths within the registration area of the United States for the respective years. This area has been considerably increased during this period of time. It will therefore be necessary to take the per cent of increase in order to make a proper comparison.

We have selected nine of the causes of death in which the use of intoxicating liquors, according to the most modern medical testimony, contributes most largely, to-wit:

Alcoholism, homicide, suicide, paralysis of insane, cirrhosis of liver, venereal diseases, angina pectoris, ulcer of the stomach and epilepsy.

We have given these in the order in which they are affected by the use of intoxicating liquors, beginning with alcoholism, the most potent cause of those named.

We herewith attach table No. 2, giving the number of deaths in the registration area for the years 1906 and 1913, for these nine causes, by sex.

We also attach table No. 3 giving the total number of deaths for these nine causes by sex for the years 1906, 1908, 1910, 1912 and 1913, together with the per cent of gain for each of these years over the preceding year given.

From these tables it will be observed that the increase in the number of deaths reported in 1913 over 1906 for males was 36.2 per cent. This included, of course, the increase in population as well as the increase by addition of new territory added to the registration area.

While this increase was 36.2 per cent for the male population, the female population for the same period and in the same registration area only increased 34.6 per cent, but for the same period of time for the nine diseases named, the increase for the male was 68.9 per cent, or 32.7 per cent excess of the increase of the male deaths for all causes; the female deaths for the same causes for said period increased 52.7 per cent, or 18.1 per cent in excess of the gain per cent of deaths for all causes during said period in the registration district.

When to these nine causes we add the other causes of death unto which the use of intoxicating liquors is a large contributing factor, for instance, typhoid fever, pneumonia, diseases of the heart and arteries, etc., we can then realize why it is that in the year 1913, the death rate in the registration area of the United States was 87,408 more males than females.

As this area included a little less than two-thirds of the population of the United States, it is evident that there were between 130,000 and 140,000 more males died in this nation in that year than females, and this difference is largely caused by the use of intoxicating liquors. Not only is this enormous excess of death of males over that of females confronting us as a people, but that it is increasing at a much greater rate than the increase of population.

Old Mother Nature is rebelling as she always does, and through the Mortality Statistics of our government she is calling with pathetic eloquence for a remedy that will eliminate and eradicate this evil from among our people.

The National Congress has heard this call. She has answered it in part with the legislation now in question. It is now for the Judicial Department of this Government to place the seal of its judicial approval upon this step of progress that will assist in at least minimizing this evil.

TABLE NO. 1

	Males	Females	Total
1906 .....	358,286	299,819	658,105
1908 .....	375,497	316,077	691,574
1910 .....	439,757	365,655	805,412
1912 .....	459,112	379,139	838,251
1913 .....	489,128	401,720	890,848
Per ct. gain from 1906 to 1913	36.2	34.6	35.4

TABLE NO. 2

	1906		1913	
	Males	Females	Males	Females
Alcoholism .....	2,390	317	3,326	418
Homicide .....	1,047	454	3,690	877
Suicide .....	4,521	1,332	7,709	2,279
Paralysis of insane .....	1,948	961	3,208	1,163
Cirrhosis of liver .....	4,036	2,043	5,788	2,709
Venereal diseases .....	1,266	810	2,869	1,720
Angina pectoris .....	1,640	1,110	2,878	1,714
Ulcer of stomach .....	731	692	1,483	1,053
Epilepsy .....	1,040	823	1,523	1,109
Per cent gain .....			68.9	52.7

TABLE NO. 3

	Males	Per cent Gain	Females	Per cent Gain
1906 .....	19,219		8,542	
1908 .....	22,324	16.7	9,342	9.4
1910 .....	25,930	15.7	10,768	15.3
1912 .....	29,876	15.2	12,270	13.9
1913 .....	32,474	8.7	13,042	6.3

CONGRESS MAY DO LESS THAN ENTIRELY PROHIBIT THE TRAFFIC IN INTOXICATING LIQUORS THROUGH INTERSTATE COMMERCE.

If Congress has power to prohibit entirely the traffic in intoxicating liquors from interstate commerce, it naturally follows that the larger power includes the lesser.

The States have power to entirely prohibit the liquor traffic, but this does not prevent them from prohibiting the traffic in part. This principle was laid down in the case of

Ohio ex rel Dollison 194 U. S. 445 and in Rippey v. Texas, 193 U. S. 504, where the court said:

"But the State has power to prohibit the sale of intoxicating liquor altogether, if it sees fit. \* \* \* That being so, it has power to prohibit it conditionally. It is true the greater does not always include the less. \* \* \* In general the rule holds good, it does here."

In discussing this question, the Supreme Court of Alabama, in *Sou. Ex. Co. vs. State*, 66 Southern 122, said:

"While intoxicating liquor is property and an object of constant commerce, it is, as we have already said, an article which is made the subject of some kind of police regulation in every State of the Union. These police regulations are not, it is true, uniform in the various States, but all the States have them. There is, therefore, a field for the operation of the Webb-Kenyon law in every State of the Union; and if the Federal Constitution, under which the government was established and which, to use the language of the Supreme Court of the United States in the *Legal Tender* cases, 110 U.S. 241, 14 Sup. Ct. 122, 28 L. Ed. 204, was 'intended to endure for ages and to be adapted to the various crises of human affairs, and not to be interpreted, with the strictness of a private contract,' then it would seem that, in adopting the Webb bill, Congress was exercising, not an implied, but an express power conferred upon it by the Constitution."

And on page 124 of the same opinion:

"The power to control includes the power to limit. Congress in the Webb law, has simply placed a limitation upon commerce insofar as intoxicating liquors are concerned, and as a part of such limitations requires common carriers to refuse to accept, for transportation, or to deliver to the consignee that which is 'forbidden commerce.'"

In the case of *American Express Company vs. Beer*, 65 Sou., on page 581, the court said:

"\* \* \* A power to wholly exclude a commodity from interstate commerce necessarily embraces within it the power to exclude it partially or when certain



conditions exist. *Wickersham vs. Rahrer*, 140 U. S. 545; 11 Sup. Ct. 865; 35 L. Ed. 572. Therefore it seems clear that Congress was well within its power in declaring it would be unlawful to transport into a State intoxicating liquor that is intended by any person interested therein to be received, possessed, sold, or in any manner used \* \* \* in violation of any laws of such state," and on page 582 we find:

"It is true, that misery, pauperism and crime largely 'have their origin in the use or abuse of ardent spirits, \* \* \* that the public health, the public morals, and the public safety ~~may~~ be endangered by the general use of intoxicating drink, \* \* \* that the idleness, disorder, pauperism and crime existing in this country are, in some degree at least, traceable to this evil,' and since 'there is no inherent right in a citizen to sell intoxicating liquors,' it not being 'a privilege of a citizen of the State or a citizen of the United States,' it would seem that the power of Congress to declare that it is not a legitimate subject of interstate commerce is beyond question."

In the case of *State vs. U. S. Express Company*, 145 N. W., on page 458, the Iowa court said:

"There can be no doubt that Congress, in virtue of its power over interstate commerce might, in its discretion, put its ban upon all transportation of liquors in interstate shipment, just as it has done with lottery tickets, the shipment of liquor to Indians, the method of shipment by express companies, the shipment of game, the carriage of infected live stock, the white slave traffic, etc. All of these and other like acts were passed to aid States which came within these provisions in the enforcement of local laws which they deemed of vital importance to their citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction and, if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not do less, and forbid the shipment under certain conditions."

In the case of *State vs. Doe*, 139 Pac., on page 1170, the Supreme Court of Kansas said:

"Intoxicating liquors belong to a class of commodities which may be made contraband at the will of Congress. Congress might, if it chose, altogether prohibit the transportation of such liquors in interstate commerce by placing them in the same category with lottery tickets, obscene literature, adulterated foods and drugs, diseased animals, and women and girls going from one State to another for immoral purposes. \* \* \* The plenary power of Congress includes the lesser power to permit interstate commerce in intoxicating liquors so far and under such conditions as Congress may determine."

Those who oppose this legislation ought not to complain because Congress is not exercising all of its power. Congress has prohibited through interstate commerce, simply the outlawed traffic in the State. Such action on the part of Congress is not only reasonable but necessary, if the laws are to be enforced. To deny the States this right, would necessitate the prohibition of all traffic in liquor from the privileges of interstate commerce, and the second condition would be infinitely worse for the liquor interests and would be of no particular benefit to those who are seeking only to protect dry territory from the out-lawry of liquor dealers in other States, and are now using interstate commerce as a weapon to destroy law and order in communities where the people are making an honest effort to maintain it.

#### THE FEDERAL CONSTITUTION GIVES NO GUAR- ANTY TO A CITIZEN TO RECEIVE AND POSSESS INTOXICATING LIQUOR FOR HIS OWN USE.

Unless there is found in the Constitution of the State some provision guaranteeing to an individual the right to receive or possess liquor for his own use, such right is not guaranteed by any provision of the Federal Constitution.

The case of *Mugler v. Kansas*, 123 U. S. 623, in which the opinion, written by Justice Harlan completely answers and refutes all arguments advanced by the plaintiff in this case. In the *Mugler* case, *Mugler* was indicted and convicted for manufacturing liquor for his own personal use. Justice Harlan, for the Court, says:

"And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general and sought to be accomplished, the entire scheme of prohibition of Kansas might fail, if the right of liquors for its own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights or liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. *Crowley vs. Christensen*, 137 U. S. 86."

In *Preston v. Drew*, 33 Maine, 558; 54 A. Dec. 639, cited in the majority opinion in *Eidge v. Bessemer*, 164 Ala. 594, Shepley S. J. said:

"The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.

"It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce by a greater use serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience of law; to disturb the peace and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a Legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In the North Carolina case of *So. Ex. Co. v. High Point* (N. C.) 83, S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

"There is nothing in the State or Federal Constitution which prohibits the people of North Carolina, speaking through the Legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, it following that the Legislature can equally prohibit the importation of such liquors by any person for his own use; and a fortiori it can forbid a common carrier, to bring in or import such liquors, irrespective of whether it is for the consignee's own use or not."

The Supreme Court of Alabama in case of *Southern Express Co. vs. Whittle*, 69 Sou. Rep. 652, said:

"The government does not interfere with or impair any one's constitutional rights of liberty or of property, when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. \* \* \* Those rights are best secured, in our government, by the observance, upon the part of

all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.' *Mugler v. Kansas*, 123 U. S. 623, 662-3. Neither the Fourteenth Amendment, nor any other, 'was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people.'

The Supreme Court of Idaho, case of *Ex Parte Crane* 151, Pac. Reporter, page 1006, recently passed upon the constitutionality of their law, which is as follows:

"Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act."

"The only means provided by the act for procuring intoxicating liquors in a Prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whisky or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited."

The court quoted the decision of *Mugler vs. Kansas* and then said:

"Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

The position of the court is clearly correct because the prohibition of the sale and the possession of liquor is the

means for facilitating its use. If the legislative department of government decides that possession is detrimental to the public welfare, such legislative discretion should not be overthrown by the judicial department of government.

Are the laws of West Virginia prohibiting the manufacture of intoxicating liquors by a citizen for his own use, the sale of such liquors in this State, constitutional and valid only so long as a way is left open for the securing by a citizen of the State of intoxicating liquors elsewhere, either in the United States or in some foreign country?

If a person has a constitutional right to purchase intoxicating liquors for his personal use, the seller would have the constitutional right to sell it to a person for such purchaser's personal use; and yet, it is settled beyond a doubt that no one has a constitutional right to sell intoxicating liquors. Such a right is not one of the rights of a citizen of a State or a citizen of the United States.

In the foregoing citation from *Mugler v. Kansas*, the Supreme Court of the United States declared that if in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat, the efforts of the people against the evils attending the use of such liquors, it is not for the courts to disregard legislative determination on that question. The court then proceeded to show that so far from such regulation having no relation to the general end sought to be accomplished, the entire scheme of Prohibition as embodied in the laws of Kansas might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized.

Precisely the same line of reasoning is applicable when we come to deal with the alleged right of a citizen to purchase and import for his own use such quantities of liquor as he might desire.

Therefore, in order to accomplish the admittedly valid main purpose it is necessary for the State under its police power to have the right to forbid the reception or possession

of liquors even for the use of the citizens. This is a step which has a fair relation to the end to be accomplished; in fact, it is necessary for the accomplishment of the main purpose.

If the decision rendered in the *Mugler* case was correct, it necessarily follows for the same reason that the State has the right to deny to a citizen the right to have intoxicating liquors brought into the State even for his own use, since to allow him to do so might thwart the State in the exercise of a power which is conceded to exist.

THE PURPOSE OF ALL LEGISLATION RESTRICTING AND PROHIBITING THE SALE OF LIQUOR IS TO DISCOURAGE AND PREVENT ITS USE.

Opposing counsel have assumed that the State did not want to interfere with the use of liquor because statutes have not been passed, specifically prohibiting the use of liquor or the purchase of liquor. There is good reason why the States have followed the policy outlined.

The government has found that the best way to prevent the use of liquor is to cut off the means for furnishing the liquor to the individual for his use. When the law prohibits the sale of liquor, many people who have heretofore used it, discontinue its use. In many places the people have found it necessary to prohibit the furnishing and giving away of intoxicating liquor. This further discourages and prevents the use.

In order to meet the many evasions of the law, still other legislation was required. If anyone had a constitutional, inherent right to use liquor, then all of these laws which prevent the sale and furnishing of liquor would be unconstitutional. On the other hand, all of those laws prohibiting the sale or furnishing of intoxicating liquors have been upheld. If a State finds that it is necessary in order to eliminate the further use of liquor, to prohibit the shipments of liquor into dry territory, the same reason which sustained the former laws upholds this legislation

The strongest reason for prohibiting the sale or distribution of liquor is to discourage and prevent its use. There can be but one purpose in passing these laws, and that is to prevent the use of intoxicating liquor.

In *State vs. Maine* 20 L. R. A., 496, the court said:

"It is common knowledge that it is the use of intoxicating liquor as a beverage that is deemed hurtful and is the mischief sought to be prevented by the legislation. The prohibition of the sale of intoxicating liquors is only a means; the end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the State. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows." \* \* \*

Taken in connection with the other legislation, its evident purpose is to further the ultimate purpose of all that legislation, viz.; to diminish the use of intoxicating liquor as a beverage.

*Ex Parte Crane*. 151 Pac. Rep. 1006.

The court, after quoting *State vs. Gilman*, 33 W. Va. 146, and *State vs. Williams*, 146 N. C. 618, and *Com. vs. Campbell*, 133 Ky. 50, said:

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

"The fact is that the harm consists neither in the possession nor sale but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that if the citizen may be prohibited from having liquor in



his possession he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession (quoting *Mugler v. Kansas*) that the manufacture for use would tend to cripple the effort to guard the community against the ends sought to be remedied."

*Lincoln vs. Smith*, 27 Vermont, 320 at 337.

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

"If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals, and productive of pauperism and crime; it seems to us that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations. The legislature in passing the law in question doubtless supposed that the traffic and drinking of intoxicating liquors went hand in hand and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that by cutting off the one the other would also fall with it.

*Marks vs. State*—159 Ala.—71, at page 84.

"The main object and purpose of all is the same \* \* \* to promote temperance and prevent drunkenness. \* \* \* The evil to be remedied is the use of intoxicating liquors as a beverage \* \* \* and the object of the law in this particular must not be lost sight of in its interpretation."

See also *State vs. Delaye*, 68 S. 995, in which the court quotes the preamble of the act in question as a guide in their interpretation:

"Whereas it is the public policy of this State to discourage the use and consumption of prohibited liquors, etc.

"So. Exp. Co. vs. Whittle, 69 So.—652. The object and purpose of all laws governing the subject of intoxicating liquors is 'To promote temperance.' The evil to be remedied is the use of intoxicating liquors as a beverage.

State vs. Phillips, 67 So. 651.

"The ultimate purpose and end of prohibition is to prevent the use of liquors as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step the way will be found to accomplish the end."

The United States Circuit Court of Appeals, 4 Cir. Fed. Rep., Vol. 219, No. 4, April 1, 1915, said on this question:

"In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power, rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

There is no proposition better settled than the above. It is for the purpose of diminishing, discouraging and preventing the use of liquor as a beverage that all of these laws are enacted.

#### WEBB-KENYON LAW VALID AS A POLICE REGULATION

Freund in his work entitled "Police Power, Public Policy and Constitutional Rights," says:

"The Federal exercise of the police power through positive legislation rests upon the enumerated powers of Congress under the Constitution. The principal power looking to the promotion of the internal public welfare is that of regulating commerce with foreign nations and among the States. The power to regulate commerce includes the power to prohibit and suppress objectionable forms of traffic. Under this power Congress has also legislated regarding shipping and navigation, interstate common carriers, and combinations in restraint of trade.

"In view of all this legislation, it is impossible to deny that the Federal government exercises a considerable police power of its own. This police power rests chiefly upon the constitutional power to regulate commerce among the States and with foreign nations, but not exclusively so."

The United States has exercised an ample police power over Indians partly under the commerce clause of the Constitution.

In the Rahrer case, 140 U. S. 345, it was said in sustaining the Wilson act that that act was:

"Enacted in the exercise of its police powers and is constitutional and valid."

The lottery case above referred to holds that the Wilson act was sustained in the Rahrer case:

"As a valid exercise of the power of Congress to regulate commerce among the States."

In the Addyson case (175 U. S. 211) the power of Congress is affirmed to regulate interstate commerce to any substantial extent. In the lottery case the power to regulate is put to the essential test whether the legislation is for the purpose of <sup>safe</sup> regarding the morals of the people of the nation or involves that purpose.

"It may be said in a general way that the police power extends to all the great public needs." *Canfield v. U. S.* 167, 518, 42 L. Ed. 260.

"It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong

and preponderant opinion to be greatly and immediately necessary to the public welfare." Holmes J. in *Nobles State Bank v. Haskell*, 219 U. S. 104, 55 L. Ed. 112.

In *Phalens* case (8 How. 161, 168) it is observed "that the suppression of nuisances, injurious to public health or morality, is among the most important duties of government."

In the case of *Hoke v. State*, 227 U. S. 309:

**"Congress may adopt not only the necessary, but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulation.**

"Congress is given power to regulate commerce with foreign nations and among the several States. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercise of it and made a ground of attack. The present case is an example. \* \* \*

"Our dual form of government has its perplexities. State and nation have different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women and more insistently of girls."

Congress in this instance has not even felt compelled to resort to "convenient" means in the exercise of its power. It has used only such power as is necessary to provide for the enforcement of law. If Congress had used its complete discretionary power, all liquors would have been denied the privilege of interstate commerce. In other words, Congress has the same power and discretion to deal with interstate commerce by enacting police regulations that the State has in enacting laws to control, or prohibit, the traffic.

LEGISLATIVE POWER MAY PROHIBIT ACTS INNOCENT IN THEMSELVES IF THE LAW-MAKING BODY THINKS THE ADMITTED EVIL CANNOT BE PREVENTED EXCEPT BY THE ENACTMENT OF SUCH A LAW.

It is well settled in law that when authority is given the Legislature or Congress to pass a law, it carries with it also authority to pass any additional legislation to make the law enforceable. This proposition is also re-enforced to the legislation now under consideration by the United States itself. Clause 18, section 8, article 1, specifically gives to Congress power to make all laws which shall be necessary and proper for carrying into execution the power given in passing interstate commerce laws. Authority is given Congress to pass a law controlling interstate commerce, and this carries with it the power to eliminate from interstate commerce any article which Congress deems to be detrimental to public morals or public health. There are many authorities for the proposition that laws may be passed by the Legislature or by Congress to make effective existing legislation. One of the familiar lines of authorities is that which prohibits non-intoxicating liquors to be sold, when the only authority given in the Constitution is to regulate or prohibit intoxicating liquors. The court upholds the law on the ground it is necessary to include innocent acts often in order to prevent the evils admitted. No one will deny that the States have full power to prohibit the manufacture and sale of intoxicating liquors. No authority

is given for the State to prohibit non-intoxicating liquors. The courts, however, have upheld such legislation because it was necessary to enforce law. The same principle is involved in national legislation in dealing with the liquor traffic.

In the case of *United States vs. Cohn*—Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. The opinion at length discussed the right of the States in the exercise of their police power to prohibit the sale of such beverage and decides that whatever the States may do in that behalf, Congress may do for the territories. After quoting the statute at length, the court said:

"No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case; and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter. \* \* \* Congress evidently had some purpose in thus changing the ordinary and common use of language."

In *State vs. Frederickson*, 101 Me. p. 37, the court reaffirms this proposition as follows:

"The liquors above enumerated are declared intoxicating by law. In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact. As was well said in *State v. Connell*, 99 Me. 61: 'It is not for the jury to revise the judgment of the Legislature and determine whether a liquor is or is not intoxicating.' When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and its non-intoxicating character, as a matter of fact, becomes entirely im-

material with respect to the application of the statute. *Commonwealth vs. Bos*, 116 Mass. 36; *Com. vs. Athens*, 12 Gray 29; *Com. vs. Brelsford*, 161 Mass., 61; *State vs. Piche*, 98 Maine 348; *State vs. O'Connell*, 99 Maine, 61; *Com. vs. Show*, 133 Mass. 575; *State vs. Intoxicating Liquors*, 76 Iowa, 243; *State vs. Guinness*, 16 R. I. 401."

This power has frequently been used both by the State and Federal government to make effective, legislation which has been legally enacted. The following are a few of the many citations illustrating this principle, and showing the extent to which it has been sustained by the State and Federal courts:

*Elder v. State*, 162 Ala. 41.  
*State v. George*, (La.) 67 South 953.  
*Feibleman v. State*, 120 Ala. 122.  
*Dinkins v. State*, 149 Ala. 49.  
*Lambee v. State*, 151 Ala. 86.  
*Eaves' case*, 113 Ga. 749, 30 S. E. 218.  
*O'Connell's Case*, 99 Maine 61, 58 Atlantic 59.  
*United States v. Cohn*, 32 S. W. 38.  
*Pennell v. State*, 123 N. W. 115.  
*State v. Walder*, 83 Ohio St. 68, 84.  
*State v. Frederickson*, 101 Maine 36, citing.  
*Com. v. Blose*, 116 Mass. 36.  
*Com. v. Athens*, 112 Gray, 29.  
*Com. v. Brelsford*, 136 Mass. 61.  
*Com. v. Piche*, 98 Maine, 348.  
*Com. v. Show*, 133 Mass. 575.  
*State v. O'Connell*, 99 Maine 61.  
*State v. Intoxicating Liquors*, 76 Iowa, 243.  
*State v. Guinan*, 66 R. I. 401.

The latest and most convincing decision upon this question is that of *Purity Extract & T. Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184; 187, involving the right of the State of Mississippi to prohibit a non-intoxicating malt liquor called "Poinsetta." It is logical, convincing and decisive on the point in question. Justice Hughes, speaking for the court, said:

"That the State, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is

undoubted."—*Bartmeyer v. Iowa*, 18 Wall., 189, 21 L. Ed. 929; *Boston Beer Co. Mass.*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley v. Christensen*, 137 U. S., 86, 43 L. Ed. 620, 11 Sup. Ct. Rep. 12. "It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government." *Booth v. Illinois*, 184 U. S. 425; 46 L. 623, 22 Sup. Ct. Rep. 168; *Ah Sin v. Wittman*, 198 U. S. 500, 504, 49 L. Ed. 1142, 1144 25 Sup. Ct. Rep. 756; *New York Ex rel, Silz v. Hesterberg*, 211 U. S. 31, 63 L. Ed. 75, 29 Sup. Ct. Rep. 10; *Murphy v. Calif.*, 225 U. S. 623; 56 L. Ed. 1229, 32 Sup. Ct. Rep. 697. "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

It would be difficult to find a more appropriate exercise of law-enforcement power than the Webb-Kenyon law. It not only deals with intoxicating liquor, which is admittedly a proper subject matter to be controlled by such power, but to make the exercise of such power more appropriate, it deals only with outlawed liquors. When Congress is given power over the subject matter of liquor in interstate commerce, it necessarily includes power to deal with such liquors as are outlawed by the States.



CASES CITED BY APPELLANT MAY BE  
DISTINGUISHED

In appellant's brief upon the former hearing, it was claimed and it doubtless will be again claimed, that the Kentucky cases, **Com. v. Campbell**, 133 Ky. 60, and others following it, **Williams v. State**, 146 N. C. 618, **Eidge v. Bessemer**, 164 Ala. 599, and **State v. Gilman**, 33 W. Va. 146; support appellant's contention that under constitutional government in the United States no government has the right to deny to a citizen the right to obtain intoxicating liquors for personal use, or as complainant's counsel will probably state it, that no Government has the right to regulate the personal habits of adult citizens not under disability.

Since the first hearing of these cases before the Court, the cases from three of the States afore noted have been explained, modified, or limited, in such a way that they no longer lend support to appellant's contention. We later refer to and consider the Kentucky cases; it is desirable now to briefly review the other cases named above:

## (1.)

**STATE v. GILMAN, 33 WEST VIRGINIA, 146**

In **State v. Sixo**, decided by the Supreme Court of Appeals of West Virginia, November 30, 1915, the Court called attention to the fact that the **Gilman Case** was decided under the previous Constitution, whereas the Prohibition amendment effective July 1, 1914, had prohibited the manufacture and keeping for sale of malt, vinous, spirituous liquors, etc., and required the Legislature to "enact such laws with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of this section," and in that connection, the Court said that it does not follow from the decision in **Gilman's case**, "that the Legislature, in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be

brought into the state, or carried from one place to another within the state;" and it cites with approval the case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, declaring the well-settled doctrine of this Court, in the following language:

"It does not follow that because a transaction separately considered, is innocuous, it may not be included in a Prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

In *State v. Phillips*, (Miss.) 67 So. Rep. 651, the Supreme Court of Mississippi thus wrote concerning the *Gilman* case:

"In *State v. Gilman*, supra, the Supreme court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors for another by any person not the owner, who had obtained a license therefor. The decision went off upon the Court's interpretation of the State Constitution, which declared "laws may be passed regulating or prohibiting the sale of intoxicating liquors, the Legislature was without power to pass the statute. The Court also held that the statute could not be upheld as coming within the police power of the State. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering, and besides the question before the Court was complicated by the Constitution of West Virginia."

In the *Gilman* case, decided November 9, 1889, two questions were considered: (1) Whether the statute prohibiting one from keeping in his possession liquors for another was violative of the Fourteenth amendment of the Federal Constitution, and (2) Whether it was violative of a provision in the then State Constitution, declaring that laws may be passed regulating or prohibiting the sale of intoxicating liquors within the State. The decision on the second

ground is without value now, because the constitutional provision has been superceded by the Prohibition amendment of West Virginia effective July 1, 1914. In so far as the decision was rested on the Fourteenth amendment of the Federal Constitution, it cannot now be accepted for several reasons. It is entirely out of harmony with subsequent decisions of the Supreme Court of the United States, and particularly with the case of **New York v. Hesterberg**, 211 U. S. 31, and **Patson v. Penn.**, 232 U. S. 138. Furthermore, in **State v. Davis**, No. 2864, decided November 30, 1915, the Supreme Court of West Virginia said in regard to a statute prohibiting the advertising of liquors:

"A liquor dealer residing and doing business in another State, who by the agency of the United States mails, sends into this state unsolicited and there circulates or distributes to prospective customers, price-lists, circulars, and order blanks advertising his liquors for sale, and which he proposed to ship into this State to them, and which advertising matter by such agency is actually delivered to a citizen of this State, is guilty of a violation of Section 8, Chap. 15, Acts of the Legislature of 1913, known as the Yost law, and may be indicted and punished as provided by such act. . . .

"To so construe said act by virtue of the Acts of Congress known as the Wilson act and Webb-Kenyon act, does not infringe on the commerce clause of Section 8, Article 1, of the Federal Constitution.

"Nor does the provision of Section 8 of said Act of 1913 so construed and applied, violate the privileges and immunities clause of the Fourteenth amendment of the Federal Constitution."

(2.)

#### **EIDGE v. BESSEMER, 164 ALABAMA, 599**

This case was distinguished in former hearing, but since then it has been destroyed as any authority here by the later decision of the Supreme Court of Alabama in **Southern Express Co. v. Whittle**, 69 So. Rep. 682, decided June 17, 1915.

In that case the Supreme Court of Alabama held that it was competent for the Legislature of Alabama to pass a statute limiting the quantity of liquor that a citizen might receive or possess for personal use, and further that the State had the same right under the police power to totally prohibit receipt and possession or importation of liquor, that it had to prohibit its manufacture.

The Court dealt specifically with the **Eidge case** and explained that it could not be regarded or accepted as a governing authority in the case then in hand, for the several reasons stated, one of which was that the **Eidge case** dealt with an ordinance of a Municipality and not with a statute of the State—the ordinance going beyond and in advance of any State statute then of force.

It is interesting to note also that the Supreme Court of Alabama in the **Whittle case** disapproved the majority view in the case of **State v. Williams**, 146 N. C. 618 and stated that it would not follow the case of **West Virginia v. Gilman**, 33 W. Va. 146, since it was opposed to the doctrine or principle in the Alabama case of **Williams v. State**, 179 Ala. 50.

(3.)

#### **STATE v. WILLIAMS, 146 NORTH CAROLINA 618**

The majority opinion in the above case has been declared unsound by the Supreme Court of Alabama in **Southern Express Co. v. Whittle**, 69 So. Rep. 652, and by the Supreme Court of Mississippi in **Phillips v. State**, 67 So. Rep. 651.

The Supreme Court of North Carolina itself, in the case of **Glenn v. Southern Express Co.**, decided December 1, 1915, has had occasion to consider the **Williams case**. After sustaining the North Carolina anti-shipping law, similar in principle to the Alabama anti-shipping law, and preparatory to following the decision of the Alabama Court in **Whittle's case**, Mr. Justice Allen, speaking for the whole Court, said that the question as to whether common carriers might not be forbidden to transport intoxicating liquors

into Prohibition territory was not decided, but expressly reserved, in **State v. Williams**, 146 N. C. 618. It was then said in the opinion:

"The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principle difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced for sale, and the bringing in of such liquors as being for personal use when intended for sale has been such a prolific source of evasion of Prohibition laws, that restrictions upon the right of delivery into the State are necessary to prevent illicit sales."

The Court then cited with approval the following from **Mugler v. Kansas**, 123 U. S. 623.

"Nor can it be said that government interferes with or impairs anyone's constitutional right of liberty or property when it determines that the manufacture or sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society, and constitute, therefore a business in which no one may lawfully engage."

The argument of the appellant against the West Virginia law is based upon the false assumption that a citizen has a constitutional right to buy or have liquor shipped to him for his personal use. Unless there is some specific provision in the Constitution of the State that guarantees to its citizens this right, then there is no such right. The following propositions are well-settled:

There is no inherent right in a citizen to sell intoxicating liquor as a beverage for personal use, as was held in **Crowley v. Christensen**, 137 U. S. 86.

No one has any constitutional right to manufacture liquor for his own use. **Mugler v. Kansas**, 123 U. S. 623.

No one has a constitutional right to have a solicitor offer to sell him intoxicating liquors for his own use from outside of the State, even though it is contemplated that

an interstate carrier bring the liquor to him. **Delamater v. State**, (S. Dak.) 205 U. S. 93.

No one has a constitutional right to have liquor advertisements sent to him, in order that he may buy liquor for his own use. **State v. Delaye**, 69 So. Rep. 993.

All anti-liquor prohibitory statutes are designed to reduce, restrict, or prevent the personal use or consumption of intoxicating beverages.

As the Supreme Court of Mississippi well said in **State v. Phillips**, 67 So. Rep. 651.

"If the object of Prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no particular difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of Prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

#### THE NECESSITY FOR AND PURPOSE OF THE WEBB-KENYON ACT

For half a century prior to 1888, the Courts recognized the jurisdiction of the State over interstate shipments of liquor from the time they entered the state, the same as other domestic liquors. This policy was reversed in the case of **Bowman v. Northwestern**, 125 U. S. 500, and in the subsequent case of **Leisy v. Hardin**, 135 U. S. 124. In reversing this policy, the Court predicated its announcement,

not upon the inability of Congress to act in the premises, but on the ground that inasmuch as Congress had enacted no law restricting or limiting interstate commerce, it was its desire "that such commerce shall be free and untrammelled."

The Wilson act followed very soon after the decision of *Leisy v. Hardin*, 135 U. S. 124, 34 L. Ed. 128; and the construction placed on the Wilson act in *Rhoades v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, started the movement for further congressional relief that would enable the States to enforce their laws, and notably their police laws, without infringing upon the right of Congress to regulate commerce. The use of the words "received, possessed, sold, or in any manner used in violation of any law of such State, etc." shows Congress intended to recognize to the fullest extent whatever valid State laws might be enacted prohibiting or regulating the receipt, possession, sale or other use in any manner, of the liquors mentioned in the act.

Whereas under the Wilson act, interference by the State could not occur until after delivery to the consignee whereby under the commerce clause of the Federal Constitution the consignee had the right to order and receive such liquors for his own use (*Vance v. Vandercook*, 170 U. S. 428, 42 L. Ed. 1100), now under the Webb-Kenyon law, shipment into a State is prohibited by Congress if any person interested therein intends to receive, possess or in any manner use, as well as to sell such liquor in violation of the State law.

In the case of *West Virginia v. Adams Express Co.* 219 Fed. Rep. 794, paragraph 13 of the opinion, the Court dealt with the contention that was made by opposing counsel, to the effect that the quoted language of Mr. Justice White in *Vance v. Vandercook Co.* 170 U. S. 438, gave countenance to the notion that Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a Prohibition State, but the Court said in reference to the quoted language, that:

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally, deleterious substances."

This idea is later on further elucidated by Justice White in *American Express Co. v. Iowa*, 196 U. S. 133; 49 L. Ed. 417, where after stating the points decided in *Leisy v. Hardin & Rhoades v. Iowa*, and stating that the doctrine in those cases was applied in *Vance v. Vandercook Co.* 170 U. S. 438, to the right of a citizen of South Carolina to order from another State for his own use merchandise consisting of intoxicating liquors to be delivered in the State of South Carolina, he said:

"Those cases rested upon the broad principle of the freedom of commerce between the States and the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of a citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in the State where made."

The Webb-Kenyon Act was intended to alter the rules above declared and to relieve the police power of the State from the dominion, under which it had long rested, of the commercial clause of the Federal Constitution. The existence and extent of the police power of the State and the former supremacy of the commerce clause of the Constitution over the police power will be clearly brought forth by considering two paragraphs from the opinion of Chief Justice Fuller in *United States v. E. C. Knight*, 156 U. S., L. Ed. 325, where he said:

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always



belonging to the States, not surrendered by them to the general Government, not directly restrained by the Constitution of the United States, and essentially exclusive.

"On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several States, and if a law passed by a State in the exercise of its acknowledged powers comes in conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme."

The Webb-Kenyon Act removed this conflict between the police power of the State and the exclusive power of Congress to regulate commerce, insofar as intoxicating liquors are concerned, by declaring that such liquors should become outlaws and contrabands of commerce, "when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the State."—Hence, for the first time, from and after March 1, 1913, the States were placed in a position where they could exert their police power to the fullest extent to secure real and effective Prohibition of the liquor traffic within their borders, and to reduce, restrict, or entirely prevent, if they deemed best to do so, the possession, or receipt of intoxicants, unless, of course, there be some provision in their State Constitutions which prevented their exerting their police power to this extent. Congress no longer permits the declared and legal policy of the States, seeking to protect their people against the mischiefs of intoxicating alcoholic poisons, to be overthrown or disregarded by the agency of interstate commerce.

This Court enunciated this safe and fundamental principle in the case of *Champion v. Ames*, 188 U. S. 356, in the following language:

"In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said in effect THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE."

The same reasoning which guided the Court in this great decision can with greater force be applied to the case at bar. The people of the States in their struggle to advance civilization and eliminate this great evil have prohibited the liquor traffic in the smaller units of Government and in 19 of the States. They made this advancement on the theory that the electorate in every unit of Government have an inherent right to better their conditions whenever the legally constituted majority in such territory desire so to do in a legal manner. As civilization advances, new conditions arise. Old customs, and traffics, which were once permitted and sanctioned, under the searchlight of truth and science are found to be injurious and are eliminated. Our Constitution, as the Supreme Court of Kansas has well said, has the marching quality in it. It opens the way for progress when the people are ready for it. Through decades of hard work, and great sacrifice the electorate have abolished the liquor traffic in 80 per cent of the area of this country. At each step of advancement they have been met by the stubborn opposition of the liquor interests. Every attempt to further curtail the liquor traffic was met by some new scheme to

evade the law. Their last refuge is the interstate commerce provision of the Constitution.

After the saloon and beverage traffic is prohibited in a State, the liquor interests use the railroads and express companies as their bartenders, to force their liquor into this territory. To require the officers of the State to wait until the liquor is delivered and then watch for an overt act of lawlessness, is placing an unreasonable and unnecessary burden upon the officers and the people who have done their best to free themselves from what they consider a curse.

Surely the State is entitled to this much protection from the Federal Government. It was granted to the States in the case of lotteries and it did not cause a fraction as much crime and misery and poverty as the liquor traffic produces. Even more consideration should be given States in combating the evils of the liquor traffic than was granted to them in suppressing the evils of lotteries.

Congress has granted this relief and the States have received a new impetus in their handicapped effort to enforce the law. It is inconceivable that a great Nation like this whose fundamental purpose is to promote the general welfare should allow any of the States to be crippled in their effort to enforce laws for the public good.

The Federal Constitution was never intended by our forefathers to be an instrument to protect lawlessness. It has always been construed so as to aid officers in the performance of their duties in enforcing law.

## 15

### PUBLIC POLICY AND THE PRESUMPTION OF CONSTITUTIONALITY

Unless there is such conflict between the law and the Constitution that cannot be reconciled, it should be sustained.

In *United States v. Harris*, 106 U. S. 635; 27 L. Ed. 290; Mr. Justice Woods, speaking for the Court said:

"Proper respect for co-ordinate branch of the Government requires the Courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

In *A. T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909, Mr. Justice McKenna said:

"It is also a maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purposes of promoting the interests of the people as a whole, and Courts will not lightly hold that an act duly passed by the Legislature was one in the enactment of which it transcended its powers."

In *Brown v. Walker*, 161 U. S. 590; 40 L. Ed., 819, Justice Brown, speaking for the Court, says:

"That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supported fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in *Fletcher vs. Peck*, 10 U. S. 88; 3 L. Ed. 162, the 'opposition between the Constitution and the law be such that the Judge feels a clear and strong conviction of their incompatibility with each other.'"

In *United States v. Gettysburg Elec. R. Co.*, 160 U. S. 668; 40 L. Ed. 576, the Court speaking through Mr. Justice Peckham said:

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such an act is presumed to be valid unless its invalidity is plain and apparent; no presumption or invalidity can be indulged in, it must be shown clearly and unmistakably. This rule has been stated and followed by this Court from the

foundation of the Government. \* \* \* That an act of Congress which plainly and directly tends to enhance respect and love of a citizen for the institution of his country, and to quicken and strengthen his motives to defend them \* \* \* must be valid."

The above decisions, and many others, have given assurance to the people that when they are striving to promote the public good and the sobriety and welfare of the people, that laws reasonably adapted to carry out that purpose will be sustained. Public sentiment, and the overwhelming majority of Congress, agreed that the outlawed liquor traffic should not have Federal protection through interstate commerce. Such a law is reasonably adapted to the end sought. The State of West Virginia has prohibited the manufacture and sale of liquor for beverage purposes. In order to secure the benefits of their organic statutory law, they found it necessary to prevent the soliciting of orders through the mails, the possession and receipt of intoxicating liquor through common carriers.

All of these laws have a direct bearing upon the main purpose sought, namely, to promote sobriety among the citizenship of the State, and to limit and discourage the use of intoxicating liquor. When it is conceded that the State may prohibit the manufacture, sale and distribution of intoxicating liquor as a beverage within the State, it logically follows that to make those laws enacted under the police power effective, the means for securing liquors from outside of the State must be inhibited also by the legally constituted authority, to-wit; Congress. The Federal legislative authority has enacted the law to divest such outlawed liquors of their interstate character. The State, under the authority of the new Constitution and police power, has wisely used its discretion in prohibiting practically every phase of the beverage traffic. This furnishes us what Justice Johnson called in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat, 1—"A frank and candid co-operation for the general good."

## THE PROTECTION OF PUBLIC HEALTH AND PUBLIC MORALS A NECESSITY

It is well settled that the safeguarding of the public health and public morals is essential to the perpetuity of Government. Whatever else the police power may include, it admittedly grants to the government the right to protect these two essentials—the public health and the public morals. This necessarily means that the Constitution must be construed, as new conditions arise, so as to carry out its fundamental purpose. This is what the Supreme Court of Kansas had in mind when they quoted in their recent decision from Willoughby on the Constitution:

“The national Constitution, under the guidance of our great Court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of progressing history.”

This theory is in complete harmony with the decision of this Court in the case of *United States vs. Gettysburg*, *supra*, and the application of that case made by the Kansas Supreme Court, to-wit: “It is of as much national importance to make a man sober as to make him patriotic.”

The above decisions deal with the very fundamentals of government. Without public morals, public health and patriotism, government itself would cease to exist. Any law which has reasonable relation to the safeguarding of these fundamentals of government and is not in irreconcilable conflict with the Constitution, must be valid. Relying upon these well recognized principles found in the most enlightened public conscience and Court decisions, the people have patiently and persistently and against great odds opposed the beverage liquor traffic until the following States and subdivisions have outlawed it.

The absolute prohibition of the sale of intoxicating liquors for beverage purposes has been adopted by nine-

teen States, Maine, Kansas, North Dakota, Georgia, North Carolina, South Carolina, Oklahoma, Mississippi, Tennessee, West Virginia, Virginia, Colorado, Washington, Oregon, Arizona, Iowa, Idaho, Alabama and Arkansas.

The Legislatures of twenty-four other States (California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Rhode Island, South Carolina, Texas, Utah, Vermont and Wisconsin) have by law prohibited the sale of intoxicating liquors in certain classes of political subdivisions, prohibition becoming operative whenever a majority of the electors in a regular or special election indicate by vote that they wish the provisions of the law to apply.

In still other States the Legislatures have arbitrarily placed certain areas under prohibition legislation, thus adding to the aggregate population in prohibition territory. Since September of 1914, ten States have adopted Prohibition. The steady growth of territory which seeks protection from a law like the one in question is shown by the following facts:

- Four States dry in 1907;
- Five States dry in 1908;
- Nine States dry in 1909;
- Ten States dry in 1914;
- Nineteen States dry in 1916.

In Utah the Legislature prohibited the traffic. The Governor of the State waited until after the Legislature adjourned, then vetoed the measure. The next Legislature will doubtless enact a prohibitory law. About five other States have fixed dates for elections for a State vote, and most if not all of them will be successful in abolishing the liquor traffic.

Approximately 80 per cent of the territory of the United States has abolished the beverage liquor traffic, and about 57 per cent of the population live in that territory.



With the majority of the people of the States living in dry territory, and an increase of those who live in dry territory amounting to 1,500,000 on the average every year for 20 years, the public necessity for this law is certainly manifest.

As a result of the rapidly growing sentiment against the liquor traffic and the more effective means at hand for enforcing the law, the decrease in the sale and consumption of liquor has been marked the last year. According to the official United States Government Report, published recently by Internal Revenue Commissioner, Mr. Osborne:

"The consumption of fermented liquors decreased for the past year . . . 200,300,436 gallons.

"And the consumption of distilled liquors decreased 14,983,333 gallons.

"Or a total decrease in consumption of all liquors 215,283,769 gallons.

"Estimating the population of the United States at one hundred million, this report shows a decrease in consumption of 2.15 gallons per capita.

"That is the largest decrease in liquor consumption ever reported for any one year in the nation's history."

This report shows a decrease in the number of liquor dealers of 16,270 for the year or at the rate of forty-four per day for the year ending June, 1915.

Should this part of our citizenship, battling against one of the nation's greatest evils, be limited or discouraged in a laudable effort to have laws enforced for an eminently legal purpose? The power to reach violations of law must be lodged somewhere in government. The State has prohibited the traffic and all of the incidents of the traffic which produce the recognized evils within their borders. Congress has divested intoxicating liquor of its interstate character when it is shipped into the State in violation of the State laws. Both the Federal and the State government have tried to follow the rule laid down by this Court



in the case of *Hoke vs. State*, 227 U. S. 309, where the Court said:

"Our dual form of government has its perplexities, state and nation have different spheres of jurisdiction as we have said. But it must be kept in mind that we are one people and the powers reserved to the states and those conferred on the nation are adapted to be exercised whether independently or concurrently to promote the general welfare materially or morally."

Both the material and moral welfare of the State of West Virginia are involved in the outcome of this case. In spite of the determined opposition of the liquor interests from outside the State and their effort to break down the enforcement of the law, the public good has been greatly advanced by the operation of these statutes. The public records show crime has been reduced 60 per cent and the arrests for drunkenness 50 per cent in the last year, ending July, 1915. With the aid of this law, if sustained, and the State laws which are involved in this hearing, still greater results will follow.

The material welfare has been advanced equally with the moral welfare. Governor Hatfield recently gave the following testimony concerning the operation of these laws:

"While West Virginia loses about \$700,000 a year in revenue from the saloons, within the next few years we expect to reduce our State expenses for the handling of criminal charges, and the maintenance of state asylums that will offset the loss from the revenue paid for legalizing the saloon traffic.

"We feel that our standard of civilization will be higher, and that the generations to come in West Virginia will be better from the standpoint of strength, intelligence, education and other environments which means so much to the success of a great and growing State, unlimited in natural wealth such as ours, and upon which depends our standard of citizenship as to what the future of our State and its achievements may be."

The States that are making the fight to maintain the standard of sobriety and morality should be encouraged and unhampered. Every reasonable doubt should be resolved in their favor in sustaining a law intended for the public good. This Court has construed the Federal Constitution broadly from time to time as the necessity arose for legislation to eliminate the evils that injure public morals. The same wise, far-seeing policy which has been used in sustaining similar laws in the past will uphold this law. Precedent, reason and enlightened public policy furnish a safe basis for sustaining the constitutionality of the Webb-Kenyon law.

## 17

#### WEST VIRGINIA STATUTES INVOLVED IN THIS HEARING

The provisions of the West Virginia statutes which are in controversy in this hearing are as follows:

The prohibition of the receipt, or possession of intoxicating liquor from a common carrier.

## 18

#### WEST VIRGINIA STATUTES AUTHORIZED AND VALID

The statutes in question are a valid exercise of the police power and of the authority granted in the Constitution of West Virginia.

## 19

#### POLICE POWER

The liquor traffic is peculiarly subject to the police power of the State and there is no inherent right to engage in it, which may not be regulated, or prohibited. The Court decisions are uniform on this one proposition at least, that the liquor business is of a character so menacing to the public welfare that no person can claim an inalienable right to engage in it. No one can complain, if, having chosen this vocation, his business is regulated, or pro-

hibited, by law; whatever the property loss to him may be or whatever means is devised by the State to accomplish such regulation, or Prohibition, so long as such means are reasonable and necessary to affect the purpose designed.

Nowhere is the anomalous character of the liquor business, and the right of the State to deal with it, free from constitutional limitations, State and Federal, which protect other property interests, better stated and defined than in the so-called License cases in 5 Howard, 504. Chief Justice Taney at page 577 put the proposition thus:

"If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

In *Beer Co. v. Mass.*, 97 U. S. 33, it was contended that since the adoption of the Fourteenth Amendment to the Federal Constitution the right to sell intoxicating liquors was secured to citizens in every State, but this Court of the United States swept such a claim aside with the remark that, "so far as such a right exists it is not one of the rights growing out of a citizenship of the United States."

In this same case the contention was made that while the Legislature might prohibit an individual from engaging in the manufacture and sale of intoxicating liquors, a corporation could not be so prohibited because of the contract with the State expressed in its charter. The Beer Company had been organized "for the purpose of manufacturing malt liquors in all their varieties," and insisted that this corporate power granted in their charter could not be taken away. Mr. Justice Bradley, delivering the opinion of the Court, said:

"The right to manufacture, undoubtedly as the plaintiff's counsel contends, included the identical right to dispose of the liquors manufactured, but al-

though this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."

The fact is everywhere recognized that the liquor traffic is not to be treated as an ordinary, legitimate business entitled to equal protection with other pursuits. As the Court says in *State ex rel Judges*, 50 U. J. L., at page 595:

"The sale of intoxicating liquors has from the earliest history of our State been dealt with by the Legislature in an exceptional way. It is a subject by itself, to the treatment of which all analogies of the law appropriate to other topics cannot be applied."

This characterization of the liquor business "as a subject by itself," necessitating treatment by the Legislature "in an exceptional way" is everywhere to be found in the cases. The business of dealing in intoxicating liquors is universally recognized as a vocation suffered rather than favored by the State. To borrow an analogy from the law of torts, the liquor business is to be treated with the respect due to a trespasser upon the premises of society rather than with the care due an invited guest. The property of the saloonkeeper cannot be wantonly or unnecessarily destroyed, nor can arbitrary or needless discrimination be made among or between those engaged in this pursuit; but everything short of this can be lawfully done which the legislative power deems wise and expedient in lessening or eradicating the evils of this commerce.

Well and forcibly did the former Chief Justice of the Supreme Court of the United States put this proposition.

In *Giozza v. Tiernan*, 148 U. S. 657, Mr. Chief Justice Fuller says, at page 61, in speaking of the constitutionality of laws regulating the sale of liquors in Texas:

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national Government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

Here we have a clear statement going to the very fundamentals in defining the limit, if any there be, to the exercise of that power residing in every State to guard against the evil of a traffic which menaces the health, the morals and the safety of the people. Of course, a State Constitution may restrict the exercise of the police power in any direction, or may express more clearly the freedom from such restrictions. But so far as a uniform rule can be stated it is to the effect that the business of dealing in intoxicants as a beverage is one having no inherent or inalienable rights; it is one for which no constitutional guaranties were written, and is to be protected only in case the legislative authority attempts in a pretended exercise of the power to regulate or prohibit it, to needlessly destroy property or arbitrarily discriminate between those against whom its power is directed.

DECISIONS FROM MANY COURTS SUSTAIN THE  
VIEW THAT THE CHARACTER OF THE  
LIQUOR TRAFFIC IS SUCH THAT IT CAN-  
NOT INVOKE THOSE CONSTITUTIONAL  
GUARANTIES WHICH PROTECT OTHER  
PERSONAL AND PROPERTY RIGHTS.

Decisions without number and from practically every jurisdiction in this country could be cited to support the general principles we contend for herein. We cite a few of the more important, going particularly to the proposition that the liquor business is peculiarly within the police power; that there is no right to engage in it which is protected by constitutional limitations; that it can not claim the inviolability of property or the equal protection of the law in the same sense that personal, political and property rights generally invoke it, and finally that there is no limit to the measures that may be devised to mitigate this evil or destroy it altogether, so long as such measures are designed to accomplish that purpose only and treat all alike who are alike engaged in the unwholesome trade.

- Foster vs. Kansas, 112 U. S. 201, 28 L. Ed. 629.  
Boston Beer Co. vs. Mass., 97 U. S. 25, 24 L. Ed. 989.  
Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.  
Kidd vs. Pearson, 168 U. S. 1.  
Crowley vs. Christensen, 137 U. S. 91, 34 L. Ed. 620.  
Goddard vs. The Town of Jacksonville, 15 Ill. 589.  
Our House No. 2 vs. The State, 4 Freem. (Iowa).  
172; Beebe vs. State, 6 Ind. 542.  
State ex rel. vs. Crawford, 42 American Reports, 186.  
Thurlow vs. Commonwealth of Mass., 5 Howard, 504.  
State vs. Kansas, 80 Pacific, 987.  
Crowley vs. Christensen, 137 U. S. 86.  
Santo et al vs. State, 2 Iowa, 165-190.

## CONSTITUTION OF WEST VIRGINIA FURTHER ELUCIDATES POLICE POWER

In 1912 the people of West Virginia adopted the following amendment to their constitution:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale, and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the Legislature may prescribe. The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

In addition to the police power of the State, this amendment to the Constitution makes clear the purpose of the sovereign people of West Virginia. The manufacture, sale and keeping for sale of all liquors for beverage purposes is prohibited. The sale for medicinal, pharmaceutical, mechanical, sacramental, scientific and industrial purposes may be authorized by the Legislature. The General Assembly cannot, however, permit the beverage traffic or distribution. If the people of West Virginia are rightly prevented from selling liquor for personal use or from manufacturing it for personal use for beverage purposes, it logically follows that no one in that State has any inherent or legal right to have it sold, or manufactured for their own use as a beverage. In enforcing this provision of the Constitution, laws were passed preventing the sale, furnishing and giving away of intoxicating liquor as a beverage. All so-called soft drinks which are commonly used as a subterfuge in the distribu-

tion of liquor were prohibited; solicitation was prohibited. A law was enacted making the place of delivery the place of sale, and also to prohibit persons from receiving or having in their possession intoxicating liquors received from a common carrier. All of these laws were enacted for the sole purpose of making effective the provisions of the new constitution.

IF A STATUTE PURPORTING TO BE PASSED TO PROTECT PUBLIC HEALTH, PUBLIC MORALS, PUBLIC SAFETY, AND PUBLIC WELFARE HAS REAL AND SUBSTANTIAL RELATION TO THOSE OBJECTS, IT IS A PROPER EXERCISE OF THE POLICE POWER, AND THE COURTS HAVE BEEN LIBERAL IN SUSTAINING SUCH STATUTES.

*Mugler vs. Kansas*, 123 U. S. 623, 660, 31 L. Ed. 205, 210 8 Sup. Ct. Rep. 273; *Plumley vs. Mass.*, 155 U. S. 461, 39 L. Ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Powell vs. Penn.* 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Slaughterhouse Cases*, 16 Wall, 36, 21 L. Ed. 394.

This same rule has been followed in construing statutes under the police power prohibiting the liquor traffic. In *Lincoln v. Smith*, 27 Vt. 320, at 337, the Court said:

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

*Marks vs. State*, 155 Ala. 71.

"The evil to be remedied is the use of intoxicating liquors as a beverage \* \* \* and the object of the law under this principle must not be lost sight of in its interpretation."

See also *State vs. Delaye*, 68 Southern 995, ex parte *Crane*, 151 Pac. Rep. 1006; also *State vs. Maine*, 20 L. R. A. 496; *Purity Extract Co. vs. Lynch*, 226 U. S. 201.



DO THE WEST VIRGINIA STATUTES HAVE A  
REASONABLE RELATION TO THE PURPOSE  
SOUGHT TO BE ACCOMPLISHED?

Both the Constitution and the State laws prohibit the sale and distribution of intoxicating liquor, as above set forth. These laws were enacted under the Constitution and the police power of the State to protect public morals and promote the public good. The real purpose of these laws is to prevent and discourage the use of intoxicating liquor as a beverage, because it is hurtful to the individual and the community. In order to accomplish the purpose, laws had to be enacted to prevent liquor dealers from outside the State from sending the deleterious commodity into the State. Opposing counsel do not claim there is any lack of authority to prevent this distribution or use within the State, but denies that either the State or the Federal legislative power may prevent its shipment for personal use from without the borders of the State.

Congress has enacted the law to give relief so far as a Federal Government is responsible for these shipments through the agencies of interstate carriers. The state has supplemented this legislation by enacting laws authorized under the Constitution and police power of the State. The laws prohibiting possession or reception of liquor as a beverage were enacted to carry out the purpose authorized in the Constitution of West Virginia. The law making the place of delivery the place of sale has a vital relation to the end to be sought by this legislation. Mr. Blue in his brief has presented fully the reasons and authority for sustaining this provision of the law.

RECEIPT AND POSSESSION OF LIQUOR FROM A  
COMMON CARRIER

The State not only has the right to prohibit certain acts, but also the right to prohibit the possession of the

instrument for accomplishing those prohibited acts, even though such instruments may be harmless in themselves. This principle was established in the case of *Patson v. Pennsylvania*, 232 Sup. Ct. Rep., page 138.

In this the purpose of the statute was to protect game for food supply. The law was sustained which prevented unnaturalized citizens from shooting such game or having in their possession certain firearms by means of which they might shoot such game.

The Court said in discussing this question:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." *Lindsley vs. National Carbonic Gas Co.*, 220 U. S. 61, 80, 81, 55 L. Ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C. 160. The State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." *Central Lumber Co. vs. South Dakota*, 226 U. S. 157, 160, 57 L. Ed. 164, 169, 33 Sup. Ct. Rep. 66; *Rosenthal vs. New York*, 226 U. S. 260, 270, 57 L. Ed. 212, 216, 33 Sup. Ct. Rep. 27; *L'Hote vs. New Orleans*, 177 U. S. 587, 44 L. Ed. 899, 20 Sup. Ct. Rep. 788. See further *Louisville & N. R. Co. vs. Melton*, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676. "The question, therefore, narrows itself to whether this Court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." Bar-

rett vs. Indiana, 229 U. S. 26, 29, 57 L. Ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

"Obviously the question, so stated, is one of local experience, on which this Court ought to be very slow to declare that the State Legislature was wrong in its facts."

It is manifest that the means for accomplishing the purpose of a constitutional amendment must be construed with a great deal of latitude, and the body which is best equipped to determine how far the State should go, is the Legislature itself. The chief obstacle in the enforcement of law in a prohibition State is the common carrier. Through the means of such common carrier attempt is made to furnish liquor to the people, just as was formerly done through the saloon. If this is permitted and as much liquor should be consumed by the people, then there would be little or no advantage in the passage of the prohibition laws.

In order to prevent this agency of distribution, the Legislature decided that the most effective means was to prevent the possession or receipt of liquor from a common carrier. All carriers are treated alike, both inter and intra-state carriers.

This statute not only has a reasonable relation to the purpose to be accomplished, but is a necessary aid in the reasonable enforcement of the law. If any person is permitted to receive the liquor and possess it from a common carrier, it ~~forms~~<sup>forms</sup> an unnecessary burden upon the officer of the law to watch the individual until an overt act of lawlessness is committed. To make law enforcement hard is not the function of government or the proper construction to be placed upon statutes intended for the public good.

We have already established in another part of this brief that no individual has any constitutional right to possess liquor for beverage purposes. If he has no right to possess liquor for this purpose, it then follows that the Legislature may prohibit him from receiving such liquor

from any agency which may be used as an easy means to accomplish the violation of the law.

If a foreigner may be prevented from having a shotgun because it is a means by which he would kill game, certainly the act in question in this statute may be prohibited without even approximating the length to which this Court went in upholding the Pennsylvania statute.

The power now residing in the State is clearly set forth in the case of *Southern Express Company vs. Whittle*, Southern Reporter 652:

The Webb-Kenyon law "prohibits the shipment or transportation of liquor from one State into another, not only when it is intended to be sold in violation of any law of such State, but when it is to be received or possessed, or in any manner used in violation of the State law."—*State of West Virginia vs. Adams Express Co.*, supra. "There is nothing in the Webb-Kenyon law to indicate any intention to restrict its beneficent and considerate effect to only those cases where total prohibition, with respect to the sale, receipt or possession of intoxicating liquors, is the statutory status in a State. The dominant idea in the law is to deny the privilege and protection of lawful interstate commerce to the instrument of intended violation of any valid State law affecting the use, possession, receipt, etc., of intoxicating liquors. The plain terms of the statute inhibit any right to enter intoxicants in interstate commerce where the purpose is unlawful."

The State is now free to exercise its police power to the extent of prohibiting either the possession, or receipt, of intoxicating liquors. These are the incidents leading to its use which will produce the evil sought to be remedied.

The Supreme Court of Idaho in discussing this point said with reference to the statute in that State: 151 Pac. Rep. 1006:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for

scientific or medicinal purposes, or for compounding or preparing medicines so that the possession of whisky or any intoxicating liquor other than wine and pure alcohol for the uses above mentioned, is prohibited."

The Court further said:

"Does the statute purport to have been enacted to protect the public health and public morals and public safety? Has it a real and substantial relation to those objects, or is it on the other hand a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation, address themselves to the legislative and judicial branch of the government. \* \* \*

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power, and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession;' and since that great difficulty has been encountered in enforcing the prohibitory laws the statement made by the learned jurist in the case of *Mugler vs. Kansas*, supra, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage might well be said with respect to its possession, which would make it read:

"'And so if, in the judgment of the Legislature the manufacture of intoxicating liquors \* \* \* would tend to cripple, if not defeat, the effort to guard the community against the evil attending the excessive

use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question."

The Court reasons directly to the point in showing what the purpose of this legislation is and then concluding that the statutes in question were intended to help aid in the execution of those statutes.

#### A STATE HAS A RIGHT TO CLASSIFY SUBJECTS FOR THE PURPOSE OF EXERCISING THE POLICE POWER.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; Magoun v. Ill. Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357; Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22, 25 L. Ed. 989; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 141, 107 S. W. 710; St. Louis I. M. & S. R. Co. v. State, 86 Ark. 518; 112 S. W. 150; Badenoch v. Chicago, 222 Ill. 71, 78, N. E. 31; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L. R. A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Com. v. Hana, 195 Mass. 262, 11 L. R. A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Slaughter-house Cases, 16 Wall. 36, 21 L. Ed. 394; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 236, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; McCready v. Va. 94 U. S. 391, 24 L. Ed. 248.

Classification may be properly based upon the "degree of evil" designed to be remedied.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. Ed. 236, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 686, 57 L. Ed. 1022, 1024, 33 Sup. Ct. Rep. 715.

In the exercise of the police power there is no limitation on the classification of objects affected so long as there is no arbitrary or unreasonable classification.

As Justice Fuller said in the case of *Giozza vs. Tierman*, 148 U. S. 657:

"The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

#### THE WEST VIRGINIA STATUTES PROVIDE REASONABLE CLASSIFICATION IN THEIR PROHIBITION.

The laws of West Virginia relating to the shipment of liquor into the State deal with agencies which are in a class by themselves. The man who attempts to manufacture liquor in the State is penalized by the laws prohibiting the manufacture for beverage purposes. If he purchases the liquor from an illegal manufacturer and attempts to distribute it, the law prevents this.

The one great source of distribution of liquor came through the common carrier and it is a natural classification to prohibit the receipt or possession of intoxicating liquor from this agency.

One of the objections raised to this kind of legislation is stated in Freund on Police Power, section 738, "Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted." The statement of this objection makes clearer than ever the reasonableness of the legislation in question. The special danger confronted in West Virginia was the shipment

of liquor through the channels of commerce. The State could only prohibit acts within her jurisdiction. The sale, furnishing and manufacture of liquor was prohibited. The next step for the State was to prohibit the possession and receipt of liquor from these agencies which aided law-breaking from without the borders of the State.

The receipt and possession of liquor from other agencies than common carriers are taken care of by other laws. The laws in question are simply part of a system of legislation intended to prevent and discourage the sale, furnishing and use of intoxicating liquor as a beverage.

TRANSACTIONS ACCESSORY OR INCIDENTAL TO  
BRINGING LIQUORS INTO THE STATE AND  
THE DISPOSITION OF THEM MAY BE  
PROHIBITED.

The proposition is well settled that any transaction which is incidental to an unlawful business may be prohibited. This is not only another phase of the principle applied by this Court in the case of the Purity Extract Co. vs. Lynch, *supra*, where it was held that an innocent act may be prohibited, if it is necessary, in preventing an evil which may be properly inhibited. That such incidental transaction may be prohibited was settled in the case of *Delameter vs. South Dakota*, 10 Am. Eng. Anno. 733.

Before the passage of the Webb-Kenyon law this case was sustained under a statute which prohibited the soliciting of orders for liquor even though the place where the order was filled and completed was outside the State. The Court sustained the law on the theory that the transaction was accessory or incidental to the business of bringing liquors into the State and disposing of them in violation of the State law.

Unless such a rule is followed in construing and sustaining State laws, those who desire to violate law would receive great encouragement. As a rule Courts have recog-



nized this fact and have sustained statutes which prevented these transactions, which are incidental to the unlawful acts. In doing this some innocent acts may be included, but this inconvenience cannot be used as a valid objection to a statute which was intended to promote the public good and to help in the enforcement of law for that end.

The Supreme Court of North Carolina in the recent case of *Glenn vs. Southern Express Co.*, states this proposition as follows:

"The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced to sell and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of evasion of the prohibition law that restrictions upon the arrival or delivery in the State are necessary to prevent illicit sales."

This is a concise statement of the facts which the officers of the law face in Prohibition territory. Wherever any means are provided for the introduction of liquor for purposes which result in little harm, this very means is used by the liquor interests to break down the main purpose of the law. Consequently, the States have been compelled to prohibit these acts which represent the lesser evil in order to prevent the greater. In practically every instance those who complain about these statutes are the ones who are responsible by their lawlessness for their enactment. If the liquor interests from outside the State of West Virginia had respected the sovereign will of the people of that State, many of these laws probably would never have been enacted. It became necessary in order to carry out the policy of the State and to secure a reasonable enforcement of the organic and statute law, to enact these provisions—making the place of delivery the place of sale, and prohibiting receipt and possession of liquor from common carriers.

## LEGISLATIVE POLICY OF WEST VIRGINIA SUSTAINED BY ITS SUPREME COURT..

When this case was before this Court on the original hearing, it was claimed that the Supreme Court of West Virginia would not sustain the statutes in question. Since the former hearing the Supreme Court of West Virginia has modified, and virtually reversed the decision in the Gilman case, or at least the construction placed upon that decision by opposing counsel. This has been referred to in a former part of this brief.

In the two decisions recently handed down by the Supreme Court of West Virginia, the position of that Court is made clear. The first case was entitled *State vs. Davis*, No. 2864, which involved the law which prohibits soliciting or receiving orders for liquor, which is section 3 of the Yost law, and section 8, which makes it unlawful to advertise such liquors for sale. The Court, after citing the case of *Delameter vs. South Dakota*, 10 Am. & Eng. Anno. 733; *Hooper vs. California*, 155 U. S. 648; *Williams vs. Fears*, 179 U. S. 270; *Rearick vs. Pennsylvania*, 203 U. S. 507, said:

"But in the face of these federal decisions how are these provisions of the statute to be applied to interstate business, or to transactions originating outside of the State? It is insisted, of course, that they fall at once under the protecting aegis of the Wilson Act, or if not so, that they come under the protection of the Webb-Kenyon law. The case of *Delameter v. South Dakota*, supra, is a direct decision that a local statute regulatory of the business of soliciting orders for liquor located in another State is valid when applied to one personally present in this State and engaged in the inhibited business. This upon the ground that such transaction is accessory or incidental to the business of bringing liquors into the state and there selling or otherwise disposing of them in violation of the local statute, and that any other construction of the Wilson Act would at least violate the spirit of that statute, and render the state

helpless in the enforcement of its local statutes intended to be protected by that act." \* \* \*

"The Delameter case is not a direct decision on the specific point involved in this case. But anti-advertising liquor laws, like the one involved here, generally, have been held valid when applied to interstate transactions. *State v. Delaye* (Ala.), 68 So. 993. Defendant was not personally or by agent in the State doing the things inhibited by statute; he made use of the United States mails to accomplish his purposes, and to do what, if present personally or by agent, he could not lawfully have accomplished." \* \* In *R. M. Rose Co. v. State*, 133 Ga., 353 65, S. E. 770, 36 L. R. A. (N.S.), 443, reversing the judgment of the lower court, it was distinctly decided that an indictment charging defendant with use of the mails in soliciting orders by means of advertising literature substantially as shown in this case constituted no offense under the penal code of that State. But as suggested in the note to this case, as reported in the 36 L. R. A. *supra*, while the Delameter case may not be a direct decision on the powers of the State to regulate or prohibit the business of advertising or soliciting orders in the manner attempted in the Yost Law, that case nevertheless destroys any affirmative support against the existence of that power which might otherwise be derived from the earlier cases referred to.

"It must be conceded that soliciting orders by means of advertisements, if resulting in a sale of liquors located outside of the State, although incidental thereto, would constitute a part of such sale, and that if prior to the Wilson Act, such soliciting would have been protected as interstate commerce, for unless a part of such commerce, how could such personal solicitation and receipt of orders for liquors, prior to that act, have been brought under the protection of the Federal Constitution and protected thereby? Whether solicited by personal presence in the State, or by the use of the United States mails, the effect of the transaction with respect to the local statute would necessarily be the same.

"Did the use of the mails by defendant in the manner shown constitute an offense under our statute? Federal protection to the liquor traffic having

been withdrawn by the Wilson Act and the Webb-Kenyon Act, we think our statute covers the case presented by the pleadings and proof in this case. Use of the mails is not prohibited by the statute, but the business of soliciting orders by means of circulars, etc., is prohibited. It seems but a short step from the act of being personally present and soliciting orders or distributing advertisements to the doing of the same thing by the agency of the United States mails. We do not think a good ground of distinction can be suggested. Of course the object to be accomplished could not be attained except by delivery of the matter to prospective customers, but this end could as well be reached by the use of the mails as by the physical presence of the absent dealer in the State. \* \* \*

"As interpreted in the Delameter case, the Wilson act removed all Federal restraint upon the States in regulating the soliciting of orders for liquor to be imported and delivered to the consignee in violation of local statutes. And as applied to actual shipments of liquor, the Supreme Court in *Rhodes v. State of Iowa*, 179 U. S. 412, and in *Re Rahrer*, 140 U. S. 545, decided that the word 'arrival,' employed in the Wilson Act, meant actual delivery of the liquor to the consignee, and that until then the State statute could not become operative upon an interstate shipment. Chief Justice Clark, in his concurring opinion in *State v. Cardwell* (N. C.), 81 S. E. 628, 630, referring to the cases just cited, says: 'In this latter case, however, Chief Justice Fuller, speaking for the Court, says: 'No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.' Upon this hint, Congress acted by passing the Webb-Kenyon law which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon delivery to the carrier. In the same case Chief Justice Fuller further says: 'Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported

packages in their original condition, created by the absence of a specific utterance on its part.' Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that statute to intoxicating liquor 'which is intended by any one interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of this State.'

"We think Judge Clark's interpretation of the Webb-Kenyon Act, though thought by the majority not to be involved in that case, has substantial foundation in the history of the Federal legislation referred to. The Webb-Kenyon Act, in terms, is limited to the shipment or transportation of intoxicating liquors, and to liquors intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of the State statute. \* \* \*

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offence of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the State by a common carrier would be in furtherance of the unlawful purposes of those violating the statute.

"Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the State, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

"So we conclude, in view of the interpretation of the Wilson Act, that this latest Federal statute supplementing that act has so far removed restrictions upon State action as to validate the provisions of the Yost Law in question, and that the defendant is guilty as charged."

The Supreme Court of West Virginia further expressed its views with reference to these statutes in the case of *State vs. Sixo*, No. 2895. This case involved a violation of Section 31 of the West Virginia statutes which provided, that:

"It shall be unlawful for any person to bring or carry into the State, or from one place to another within the State, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed, or written on the side or top of the suit case, trunk or other container in large, display letters in the English language, the contents of the container or containers and the quantity and kind of the liquors contained therein."

In sustaining the validity of this statute the Court said:

"But it is insisted by counsel for plaintiff in error that said section 31 of chapter 7, of the acts of the Legislature of 1915, is unconstitutional and void. Counsel argues at great length to prove that the Legislature could pass no valid act making it an offense for a person to have in his possession liquors, unless for some improper purposes. \* \* \*

"The case of *State v. Gilman*, supra, is authority for the proposition that a statute prohibiting the keeping of liquors by one person for another, without a State license therefor, is unconstitutional and void, under the Constitution then in force; but it does not follow that the Legislature in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be brought into the State or carried from one place to another within the State.

"Since the case of *State v. Gilman* was decided, the Constitution of the State has been amended. The Constitution as amended prohibits the manufacture and keeping for sale of malt, vinous and spirituous liquors, etc., and requires the Legislature to 'enact such laws with regulations, conditions, securities and as may be necessary to carry into effect the provisions of this section.'

"This amendment became effective July 1, 1914.

"It is the duty of the Legislature to enact such laws as may be necessary to make effective this provision of the Constitution as amended. The Legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the State, or carried from one place to another within the State, in quantities of one-half gallon or

more, to be marked or labeled. Whether or not this is a wise policy is not for the Courts to determine. If the Legislature has not exceeded its powers, the Courts cannot interfere. The Courts may decide whether or not the Legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; this would be to subordinate the will of the Legislature to the opinion of the Courts."

"In a well considered case of Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, Mr. Justice Hughes wrote a very able opinion and said:

"It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, that it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

"We are clearly of the opinion that the portion of said section 31, now under consideration, is within the legislative power."

It is manifest from these decisions that the Supreme Court of West Virginia upholds the doctrine in construing their own constitution as set forth in the Purity Extract Co. vs. Lynch case. Under this far-reaching and wise decision, even innocent acts may be prohibited when they are used as aids to the violation of laws enacted under the police power. It is certainly manifest to any public officer, who has had any experience in enforcing laws against the liquor traffic, that the statutes in question are necessary in order to have a reasonable enforcement of the prohibition laws of West Virginia.

If a liquor dealer from Baltimore, Cincinnati or Louisville, Ky., can reach over into West Virginia and by an express company, or railroad, distribute liquors in this way, a great benefit to be attained by the prohibitory law will be destroyed. As has been repeatedly held by the many State



Supreme Courts, the purpose of all these laws is to discourage and prevent the use of liquor. If as much liquor is to be used in a State after prohibition as before, it will then be admitted that the purpose of the law is a failure. We do not believe that any such construction is made necessary by the provisions of either the State or Federal Constitution.

The Supreme Court of West Virginia also enunciates the doctrine that any transaction which is accessory, or incidental to the bringing of liquors into the State to be disposed of in violation of law, may be prohibited. This doctrine, also, is sufficient to sustain the laws in question. If liquor may be delivered into West Virginia and the State cannot prevent any person from having it or possessing it, the enforcement of the statute is made unreasonable and difficult and the law-breaking liquor interests would be encouraged to increase their efforts in breaking down the remaining statutes intended to curb this well-recognized evil. The receiving of the liquor and the possessing it and delivering it into the State are all incidents to the acts which the State has legally prohibited. As has been said repeatedly by the Courts of last resort in cases cited, it is not the sale of liquor that injures the purchaser; it is not the possession of it primarily that injures the purchaser, **but the use of the liquor**, and all of these acts, the sale, possession and receipt, are but a means of placing the liquor where it will do harm. Consequently, the same reasoning which sustains the law prohibiting the sale of liquor should sustain the law which prohibits the receipt, or possession of the liquor.

The length to which the State will go in prohibiting these means which encourage the use, is a matter for legislative discretion. In the evolution of the race and the development of a higher civilization, these steps will be taken in response to growing public sentiment upon this question.

To deny the State the right to enact such laws would thwart the fundamental purpose of our government to pro-



mote the general welfare and safeguard public morals and the public good. The Supreme Court of West Virginia has laid down the principles by which it will be guided in construing these laws and we do not believe that this Court can justly interfere with these decisions, so clearly intended to aid the enforcement of law and promote the public welfare.

Statutes, which help to make men sober and patriotic, which result in reducing crime and degeneracy and which make possible the enforcement of law, must be valid, if our form of government is to endure.

We respectfully submit that the decree of the lower Courts should be sustained.

W. B. WHEELER,  
Of Counsel for the State of West Virginia.



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JAMES D.

**IN THE  
SUPREME COURT OF THE UNITED STATES**

October Term, 1915.

*25-76*  
No. 383.

**THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,***

**vs.**

**THE WESTERN MARYLAND RAILWAY COMPANY  
AND THE STATE OF WEST VIRGINIA.**

No. 384.

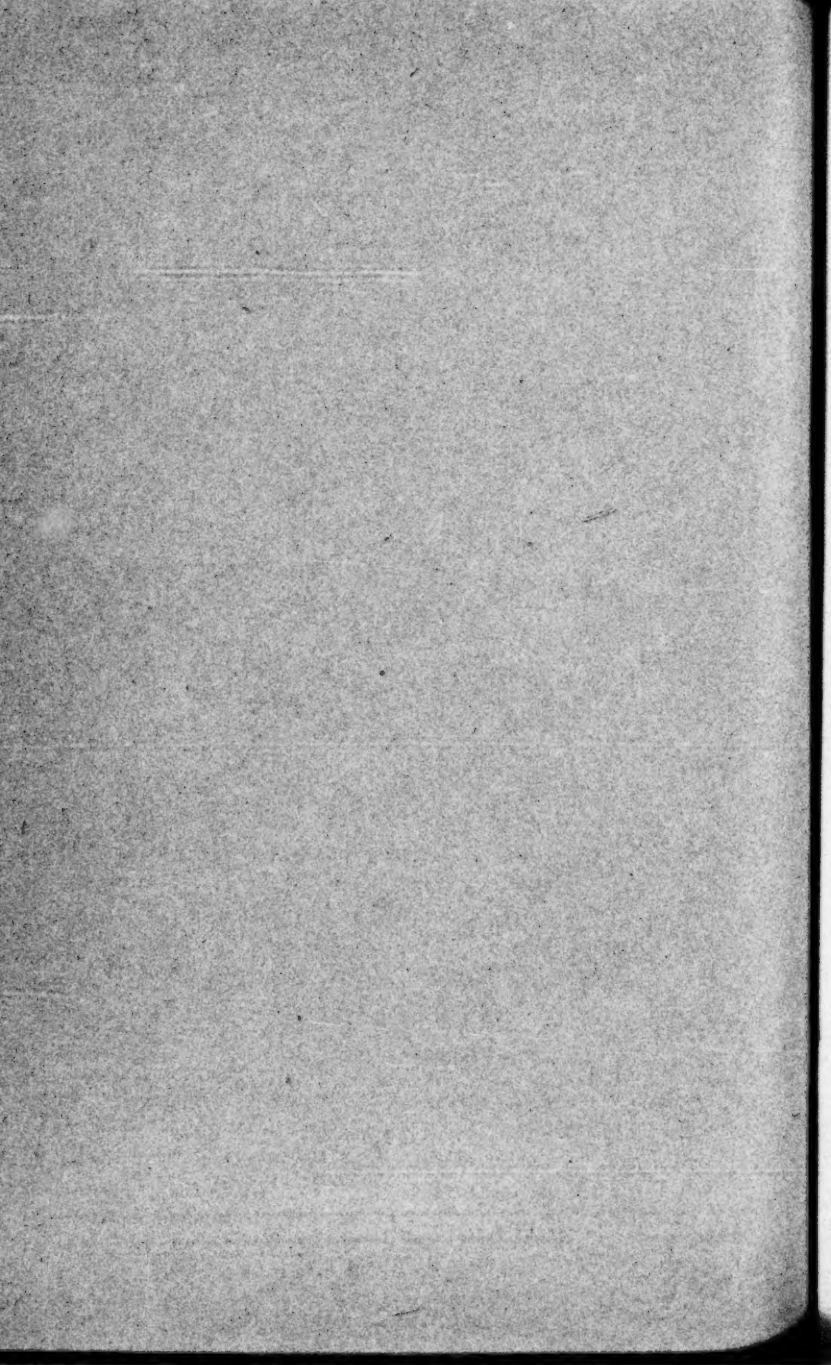
**THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,***

**vs.**

**THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA.**

**APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT  
OF MARYLAND.**

Brief filed by permission of the court, on behalf of the State of West Virginia, appellee, by the Attorneys-General (as amici curiae) of the several states as shown at the end of the brief.



## INDEX.

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	Page.
West Virginia Prohibition Amendment.....	6
Statutes of West Virginia.....	7
Purpose of this brief.....	9
The Webb-Kenyon Act is valid.....	10
Neither the 14th Amendment to the Federal Constitution nor the "Due Pocess" Clause of State Constitutions guarantee to a citizen of a state the right to receive and possess intoxicating liquors for personal use in unlimited quantities, or in any quantity, as against the exercise of the police power by the state. There is no such guaranty to a citizen of West Virginia in the Constitution of that state as amended July 1st, 1914.....	18
The Police Power of the State, and its extent.....	20
The real purpose of Prohibition legislation is to prevent personal use of liquor.....	29
Extent of police power respecting personal use of liquors, further considered.....	35
State decisions, sustaining recent state laws, which are contrary to appellant's contention as to right of a citizen to receive and possess liquors for personal use .....	40
Cases from Kentucky and Oklahoma reviewed.....	54
The Webb-Kenyon Law does not exclude from its operation shipments of liquor for personal use, if the liquor is intended to be received, possessed, sold, or in any manner used contrary to the laws of the state into which the liquor is sought to be introduced .....	58

# INDEX OF CASES.

	Page.
American Express Co. v. Commonwealth (Kentucky) 238 U. S. 190.....	10, 11, 15, 17, 22
Adams Express Co. v. Commonwealth, 160 Ky. 66; 169 S. W. 603.....	16
Addystone P. & S. Co. v. United States, 175 U. S. 211.....	17
American Express Co. v. Beer (Miss.) 65 So. Rep. 575.....	61
American Express Co. v. Iowa, 196 U. S. 133.....	11
Atkluson v. Southern Express Co., 94 S. C. 44; 78 S. E. 516.....	16, 48
Barbier v. Connolly, 113 U. S. 273.....	20
Booth v. Illinois, 184 U. S. 426.....	23
Boston Beer Co. v. Mass., 97 U. S. 25.....	23
Bowman v. R. R. Co., 125 U. S. 465.....	22, 25
Bristol Distilling Co. v. Southern Ex. Co. (Court of Appeals of Virginia, Jan. 12, 1915)	60
Brown v. Maryland, 12 Wheton 420.....	26
Buttfield v. Stranahan, 192 U. S. 470.....	18
Canfield v. U. S., 167 U. S. 518.....	22
Carl's Case, 87 Ala. 17; 6 So. 118; 4 L. R. A. 380.....	19
Case and Comment, December, 1913, page 641.....	31
Champlin v. Ames, 188 U. S. 321, 362.....	17, 27
Commonwealth v. Campbell, 133 Ky. 50; 107 S. W. 383; 24 L. R. A. (N. S.) 172.....	49, 54
Congressional Record, vol. 49.....	58
Crane, Ex parte, 151 Pac. 1006.....	24, 48, 56
Crowley v. Christensen, 137 U. S. 91.....	23, 33, 55
Delematar v. South Dakota, 205 U. S. 93.....	24
Eldge v. City of Bessemer, 164 Ala. 599.....	44, 54, 57
Foster v. Kansas, 112 U. S. 201.....	23
Glenn v. Southern Express Co. (N. C.) 87 S. E. Rep. 136-15, 16, 24, 45, 54	
Golden & Co. v. Justice's Court (Cal.) 140 Pac. 49.....	33
Hamm Brewing Co. v. C. R. I. & P. R. R., 215 Fed. 672.....	61
Heyward v. Henderson, 109 Ga. 373; 47 L. R. A. 36; 77 Am. St. Rep. 384.....	24, 38
Hipollite Egg Co. v. United States, 220 U. S. 45.....	18
Hoke v. United States, 227 U. S. 308.....	18
Holden v. Hardy, 169 U. S. 363.....	27, 55
Kidd v. Pearson, 188 U. S. 1.....	23
Lawton v. Steele, 152 U. S. 133.....	23, 43
Leisy v. Hardin, 135 U. S. 100.....	10, 22
Lincoln v. Smith, 27 Vermont, 328.....	29
Maine v. Bass Pub. Co., 71 Atl. 894; 20 L. R. A. (N. S.) 495, 496....	32
Marks v. State, 159 Ala. 71.....	30
Mugler v. Kansas, 123 U. S. 623.....	23, 34, 37, 49, 50, 53, 55, 57
Murphy v. California, 225 U. S. 623.....	23
New York, ex rel. Silz v. Hesterberg, 211 U. S. 31.....	23, 49, 53
Nobles State Bank v. Haskell, 219 U. S. 104.....	22

	Page
Otis v. Parker, 187 U. S. 607.....	2
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25.....	16
Palmer v. Express Co. (Tenn.) 165 S. W. 236.....	60, 61
Patsone v. Penn., 232 U. S. 138.....	23, 43, 53
Peede, Ex parte (Tex.), 170 S. W. 749.....	60
Perrin v. United States, 232 U. S. 478.....	16
Phillips v. City of Mobile (Ala.), 208 U. S. 472.....	16
Preston v. Drew, 33 Me. 558; 54 Am. Dec. 639.....	24, 38
Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192-22, 23, 49, 51, 53, 55	
Rahrer, In re., 140 U. S. 545, 546.....	10, 13, 14, 20, 23
Reid v. Colorado, 189 U. S. 137.....	18
Reymann Brewing Co. v. Brister, 179 U. S. 445.....	16
Rhodes v. Iowa, 170 U. S. 412.....	11, 13, 22
Silz v. Hesterberg, (N. Y.) 211 U. S. 31.....	43
Southern Express Co. v. High Point, (N. C.) 83, S. E. 254, 255.....	40, 60
Southern Express Co. v. Beer (Miss.) 65 South. 575.....	16
Southern Express Co. v. State, 188 Ala. 454; 66 So. Rep. 115.....	15, 60
Southern Express Co. v. Whittle, (Ala.) 69 So. Rep. 652.....	15, 24, 38, 42, 54, 60
State v. Cardwell, (N. C.) 81 S. E. 628, 632.....	18
State v. Davis, (W. Va.) 87 S. E. 262, (Decided Nov. 30, 1915.....	51, 54
State v. Delaye, (Ala.) 68 So. Rep. 992.....	24
State v. Doe, (Kan.) 139 Pac. 1169.....	16
State v. Express Co. (Iowa) 145 N. W. 451.....	16, 18
State v. Gilman, 33 W. Va. 146; 10 S. E. 283; 6 L. R. A. 847.....	49, 51, 53, 54, 58
State v. Grier, (Del.) 88 Atl. 579.....	16
State v. Phillips (Miss.) 67 So. Rep. 651.....	25, 31, 45
State v. S. A. L. R. R., 169 N. C. 303; 84 S. E. 283.....	16
State v. Sixo (W. Va.) 87 S. E. 267 (Decided Nov. 30, 1915.....	51, 54
State v. Topeka Club, 82 Kans. 756; 109 Pac. 183.....	25
State v. Williams, 146 N. C. 618; 61 S. E. 61; 17 L. R. A. (N. S.) 299	44, 45, 49, 54, 58
Stevens v. State, 60 Ohio State 605; 56 N. E. 479.....	16
Taylor v. Commonwealth, (Virginia) 85 S. E. 499.....	16
Tinker v. State, 90 Ala. 638, 641.....	16
United States v. Bopper, 98 Fed. Rep. 423.....	18
United States v. E. C. Knight Co., 156 U. S. 1.....	21
United States v. For-three Gallons of Whiskey, 93 U. S. 188.....	18
United States v. Freight Association, 166 U. S. 290.....	17
United States v. Freight Association, 171 U. S. 505.....	17
United States v. Oregon-W. R. & N. Co., 210 Fed. 378.....	16, 24, 37
Vance v. Vandercook Co., 170 U. S. 438.....	11, 16, 22, 56
Van Winkle v. State, (Del.) 91 Atl. 385.....	16, 46, 60
Wallace v. State, 8 Ala. App. Ct. Rep. 386; 62 So. Rep. 365.....	25
Western of Alabama Ry. Co. v. Brewing Co., 177 Ala. 149.....	24
West Virginia v. Adams Ex. Co., (C. C. A.) 219 Fed. Rep. 794.....	16, 18, 32
Williams v. State, 179 Ala. 51.....	24, 44
Wilson, Ex parte, 6 Okl. Cr. 451; 119 Pac. 596.....	49, 56, 57

**IN THE  
SUPREME COURT OF THE UNITED STATES**

October Term, 1915.

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No. 383.

THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,*

vs.

THE WESTERN MARYLAND RAILWAY COMPANY  
AND THE STATE OF WEST VIRGINIA.

---

No. 384.

THE JAMES CLARK DISTILLING COMPANY,  
*Appellant,*

vs.

THE AMERICAN EXPRESS COMPANY AND THE  
STATE OF WEST VIRGINIA.

---

APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT  
OF MARYLAND.

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Brief filed by permission of the court, on behalf of the  
State of West Virginia, appellee, by the Attorneys-Gen-  
eral (as amici curiae) of the several states as shown at  
the end of the brief.

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(Italics in this brief supplied.)



Briefs have been or will be filed by counsel for the State of West Virginia, stating the case as presented by the record, and dealing with the West Virginia Statutes and the West Virginia Prohibition Amendment, effective July 1st, 1914.

We propose to confine ourselves to the maintaining of two propositions:

(1) The Webb-Kenyon Act is valid.

(2) The State of West Virginia, under the police power, may validly prohibit or regulate the receipt and the possession of intoxicating liquors within its borders; and nothing in its state constitution as amended, nor in the 14th Amendment to the Federal Constitution, nor in the "commerce clause" since the Webb-Kenyon Law, will prevent it from exerting its police power in the manner stated, although the liquors are for personal use.

Preparatory to the discussion of these propositions, it is desirable to set forth said state Prohibition Amendment, and to refer to the several West Virginia statutes that are considered or mentioned in the briefs of the parties to the causes, respectively.

#### WEST VIRGINIA PROHIBITION AMENDMENT.

At the general election in 1912 the following Amendment to the Constitution was ratified by the people of West Virginia, to take effect July 1st, 1914:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer, or any intoxicating drink, mixture or preparation of like nature, except

as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of this section."

### STATUTES OF WEST VIRGINIA.

The bill as filed drew in question sections 1, 2, 3, and 4, of the Yost Law of February 11, 1913, effective July 1, 1914, and particularly the following provision of section 3:

"And in case of a sale in which a shipment or delivery of such liquors is made by common or other carrier, sale thereof shall be deemed to be made in the county where the delivery thereof is made by such carrier to the consignee his agent or employee."

On the former argument in this case there was called to the attention of the Court by counsel for the State of West Virginia, the following provision of Amended section 7 of the West Virginia law, approved February 5, 1915, to take effect thirty days from its passage:

"And provided further that no common carrier for hire, nor other person for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry

pure grain alcohol, wine, or such preparations as may be sold by druggists for the special purposes and in the manner set forth in sections 4 and 24."

After the submission and former argument of these causes, counsel for the appellant, James Clark Distilling Company, called to the attention of this Court, a statute of West Virginia enacted May 24th, 1915, effective August 22nd, 1915, as follows:

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

Counsel for appellant thereupon made the following suggestion to the Court in reference to said amended section 34:

"As the purpose of these suits is to compel the defendants to carry interstate shipments of liquor into West Virginia for the personal use of the con-

signees, the form of the decree will depend upon the state of the law of West Virginia at the time the decree is entered. At pages 15-17 of the brief for the State of West Virginia it was contended that the amendment of section 7 in January, 1915, had the effect of rendering moot our claim that section 3 of the law was not intended to apply to interstate shipments for personal use, and it will doubtless now be contended that interstate shipments of intoxicating liquors for personal use are absolutely prohibited by the amendment of May 24, 1915, and that such prohibition is authorized by the Webb-Kenyon Law.

"We submit that the amendment of May 24, 1915, is in contravention of the "commerce clause" of the Constitution of the United States, as a direct regulation of interstate commerce, beyond the power of the State of West Virginia either under the supposed authority of the Webb-Kenyon Law or otherwise; and also that it is in contravention of the Fourteenth Amendment for the reasons stated in our reply brief."

#### PURPOSE OF THIS BRIEF.

It is the purpose of this brief to take issue with the suggestion of appellant's counsel, and to insist that the statute of West Virginia prohibiting the receipt and possession of intoxicating liquors for personal use is a valid exercise of the police power of that state; that it does not contravene the 14th Amendment to the Federal Constitution; that such a statute lays the predicate for the operation of the prohibition contained in the Webb-Kenyon Act; and that said Federal Act is a valid exercise by Congress of the power to regulate commerce, in liquors, among states.

## I.

## THE WEBB-KENYON ACT IS VALID.

In the case of *Adams Express Co. v. Com. of Kentucky*, 238 U. S. 190, reference was made by this Court to the Webb-Kenyon Act, which was there construed.

The Court regarded the Act as a regulation of interstate commerce by Congress, pursuant to the responsibility resting upon it as recognized and stated in *Leisy v. Hardin*, 135 U. S. 100, and in the case of *In Re Rahrer*, 140 U. S. 546, to remove, so far as the regulation of interstate commerce is concerned, the restriction upon the states in dealing with imported articles of trade within their limits, which articles have not been mingled with the common mass of property therein.

In the *Kentucky case*, *supra*, reference was made to the Wilson Act of 1890 and to the case of *In Re Rahrer*, 140 U. S. 546, sustaining the same, in which it was held that Congress had not thereby attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the state, or to adopt state laws; but had taken its own course and made its own regulation, applying to subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws in dealing with such property; and that Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, such impediment having been created by the absence of a specific utterance on the part of Congress; that Congress imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It seems evident to us that the foregoing language applies with equal force to the prohibitions contained in the Webb-Kenyon Act, and conclusively establishes the validity of the same.

In *Rhodes v. Iowa*, 170 U. S. 412, and in *Vance v. Vandercook*, 170 U. S. 428, the Wilson Act was construed in such a way as that a state under its police power might regulate the traffic in intoxicating liquors after delivery to the consignee, although nothing in the Wilson Act prevented shipments of liquor in interstate commerce to a consignee for his own use, so long as he did not undertake to sell it. This result, however, was deduced from the "commerce clause" of the Federal Constitution in connection with the court's interpretation of the Wilson Act, and not from the 14th Amendment to the Federal Constitution, nor from a consideration of the police power of the state.

The cases just referred to rested rather upon the broad principle (which existed until there was Congressional action to the contrary) of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of a citizen of a state to contract to send merchandise into other states, and they rested also upon the obvious want of power of one state to destroy contracts concerning interstate commerce, valid in the state where made, as explained by the present Chief Justice in the case of *American Express Co. v. Iowa*, 196 U. S. 133.

Hence, there was, as explained in the *Kentucky case*, *supra*, before the passage of the Webb-Kenyon Act, nothing to prevent shipment of intoxicating liquors in interstate commerce for the personal use simply of the consignee, the Wilson Act, as construed, not being intended by Congress to have that effect.

It is easily seen that the Wilson Act, as construed, would admit of the shipment and delivery to a citizen of large quantities of intoxicating liquors under the claim or pretence that they were for personal use, and that such stocks of liquors thus admitted might easily be made the means of conducting successfully an illicit traffic in liquors, and thereby defeat the valid efforts of the states to effectually prohibit such traffic. The presence also of unlimited quantities of liquors for personal use would entirely defeat the policy of the prohibition states in so far as efforts were made by them, directly or indirectly, to limit or prevent the consumption of intoxicants in order that drunkenness and intemperance among the people might be reduced, or, if possible, wholly prevented.

Congress considered it proper to exercise its power for the purpose of aiding the states in the efforts they might make under the police power to enforce their local policy in respect to intoxicating liquors, the traffic in them or the use of them by the people of the state, and hence, by the Webb-Kenyon Act, extended the Congressional prohibition so as to forbid in defined cases the introduction of liquors *at all* into a state from another state. The meaning of the Webb-Kenyon Act, as the Supreme Court said in the Kentucky case, is so plainly shown by the title and body thereof, that there can be no room for controversy as to its construction and no resort to outside sources to ascertain its true intent is necessary.

Whereas under the Wilson Act, unlimited quantities of liquor for personal use could freely move from one state into another and large quantities be obtained for illicit sale in a state under the false claim (often impossible to detect) that it was intended for personal use, now under the Webb-Kenyon Act, a shipment of liquor is entirely interdicted—forbidden even to be transported across the

state border—when it is intended to be dealt with in violation of the local state law, or, as more fully explained in the Act itself, when the liquor named in the Act, “is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state;” that is to say, the state into which it is proposed to ship or transport the liquor in interstate commerce.

We cannot forecast what argument, if any, will be presented by appellant’s counsel against the constitutionality of the Webb-Kenyon Law as a regulation by Congress of interstate commerce. We have, however, examined the brief filed by appellant’s counsel and used upon the former hearing, which contains very little (less than two pages) upon the subject of the constitutionality of the Webb-Kenyon Law. The contention was there made that the Webb-Kenyon Law, “as construed and applied by the lower court,” would be unconstitutional. In support of this proposition there was a short extract from the case of *Rhodes v. Iowa*, 170 U. S. 412, asserting merely that the right of contract for the transportation of merchandise from one state to another, or across another, involved interstate commerce, and imported a relation which necessarily must be governed apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. But this evidently is no authority against the validity either of the Wilson Act or of the Webb-Kenyon Act, since these Acts are regulations of commerce by Congress.

Counsel for appellant also in that connection quoted the following from the case of *In Re Rahrer*, 140 U. S. 546: “Nor can Congress transfer legislative power to a state, nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it



must be one that it would be competent for it to pass itself and not a law passed in the exercise of the police power." It is surprising that counsel would cite that paragraph as an authority against the Webb-Kenyon Act, since the opinion in the case of *In Re Rahrer, supra*, in an extract which we have already quoted, clearly showed that the Wilson Act (and the same thing may be said of the Webb-Kenyon Act) did not constitute a transfer by Congress of legislative power to a state, nor sanction a state law in violation of the Constitution; and that Congress had not, by the Wilson Act, adopted a state law as its own.

It is asserted further in appellant's brief in that connection, (and this completes substantially all that is said against the validity of the Webb-Kenyon Law), that contracts made by plaintiff in Maryland for the sale of liquors intended for the personal use of consignee in West Virginia, and their transportation and delivery at destination, are all subject matters which belong to interstate commerce and not to the reserved police power of West Virginia. This, we think, is entirely inapplicable to the present situation. Congress, by the Webb-Kenyon Act, has made a regulation of interstate commerce prohibiting shipments of liquor into one state from another in defined cases. In brief, the cases are: when the liquors desired to be shipped are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of such state.

There must, of course, in every case be a valid state law to be violated, and such state law in the matter of its validity, must be brought to the test of the state constitution and to the 14th Amendment of the Federal Constitution; but the "commerce clause" of the Federal Constitution is no longer a bar to state action, or to the en-

forcement of the state law, since Congress has intervened by a regulation of its own and made it possible for the power of the state, under a valid law, to do its full and perfect work in respect to liquors of the character named.

The assault upon the Webb-Kenyon Bill by counsel for the appellant in the former brief is so weak and so meagre, that we cannot think that counsel had any serious expectation of having the Webb-Kenyon Law declared to be invalid. Not only that, but a careful reading of the opinion of the court in *Adams Express Co. v. Kentucky*, *supra*, a consideration of the treatment of the case, and the general trend of the opinion lead us to the conclusion that the court has already made up its mind that the Webb-Kenyon Act is valid. We can scarcely believe that the opinion would have been prepared as it was, and reference would have been made in the opinion to the Webb-Kenyon Act in the terms employed, if the court had doubted its validity. The Supreme Court of North Carolina, in *Glenn v. Southern Express Co.*, (decided December 1st, 1915), has said that the opinion of the Supreme Court in the case of *Adams Express Co. v. Kentucky*, *supra*, gives color to the belief that the court regards the question as settled. It seems to us that it is necessarily sustained by previous utterances of the court in respect to the Wilson Act, and such is the conclusion of all the courts, State and Federal, that have thus far had occasion to pass upon said Act. We cite cases which contain all that can be said upon this subject and which we think conclusively establish the validity of the Webb-Kenyon Act:

*Southern Express Co. v. State*, 188 Ala. 454; 66 South. Rp. 115.

*Southern Express Co. v. Whittle*, (Ala.) 69 South. Rp. 652.

- State v. S. A. L. R. R.*, 169 N. C. 303; 84 S. E. 283.  
*Glenn v. Southern Express Co.*, (N. C.) 87 S. E. Rp. 136.  
*State v. Doe*, (Kan.), 139 Pac. 1169.  
*State v. Express Co.*, (Iowa), 145 N. W. 451.  
*Southern Express Co. v. Beer*, (Miss.), 65 South. 575.  
*Atkinson v. Southern Express Co.*, 94 S. C. 444; 78 S. E. 516.  
*Taylor v. Commonwealth*, (Virg.), 95 S. E. 499.  
*Adams Express Co. v. Com. of Ky.*, 160 Ky. 66; 169 S. W. 603.  
*State v. Grier*, (Del.), 88 Atl. 579.  
*Van Winkle v. State*, (Del.), 91 Atl. 385.  
*U. S. v. Oregon-W. R. & N. Co.*, 210 Fed. 378.  
*West Virginia v. Adams Ex. Co.*, (C. C. A.), 219 Fed. Rp. 579.

There is nothing in the terms of the Webb-Kenyon Act to indicate that the state laws referred to therein must constitute a total prohibition of the receipt, possession, sale, or use in any manner, of intoxicating liquors.

A regulatory or restrictive measure short of total prohibition is a police measure and has been held by this court to be within the terms of the Wilson Act of 1890.

- Vance v. Vandercook*, 170 U. S. 438 (reversing on this point, *Vandercook v. Vance*, 80 Fed. 786).  
*Reymann Brewing Co. v. Brister*, 179 U. S. 445.  
*Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25.  
*Phillips v. City of Mobile*, 208 U. S. 472.  
*Tinker v. State*, 90 Ala. 638, 641.  
*Stevens v. State*, 61 Ohio State 605; 56 N. E. 479.

We submit that the Webb-Kenyon Act, viewed as a regulation by Congress of interstate commerce, presents no

difficulty as to shipments of liquor for personal use; and that the language is clearly broad enough to include such shipments, if a state law against receipt or possession of liquors for personal use offends no provision of the state constitution nor the 14th Amendment to the Federal Constitution. The Webb-Kenyon Act would accomplish very little if construed in such a way that liquors for personal use, or liquors claimed to be for such use, may continue to freely move in interstate commerce.

It must be noted that in *Adams Express Co. v. Commonwealth of Kentucky*, 238 U. S. 190, this court held that the shipment in question was not illegal in view of the laws of Kentucky, "*as construed by the highest court of that state,*" without in any way committing itself to the correctness of such construction of the law and Constitution of Kentucky. The Kentucky statute was not by the Supreme Court subjected to the test of the 14th Amendment to the Federal Constitution; nor did the court declare that the result in the case was one of general application and that no other state could constitutionally forbid the receipt and possession by a citizen of intoxicating liquors for personal use.

The Webb-Kenyon Act is in the form of a prohibition against shipments of liquor in interstate commerce in defined cases; it is well settled that Congress may regulate commerce by adopting prohibitions excluding certain articles from the right to be transported from one state into another.

*Champion v. Ames*, 188 U. S. 321. (Lottery tickets.)

*U. S. v. Freight Association*, 166 U. S. 290.

*U. S. v. Freight Association*, 171 U. S. 505.

*Addystone P. & S. Co. v. U. S.*, 175 U. S. 211.

(Prohibitory clauses of Sherman Anti-Trust Act.)

*Hoke v. U. S.*, 227 U. S. 308. (White Slave Traffic.)

*Hipolite Egg Co. v. U. S.*, 220 U. S. 45. (Adulterated articles of food.)

*Reid v. Colorado*, 189 U. S. 137. (Live stock having infectious and contagious diseases.)

*State v. U. S. Express Co.*, (Ia.), 145 N. W. 451.

*U. S. v. Forty-three Gallons of Whiskey*, 93 U. S. 188.

*Perrin v. U. S.*, 232 U. S. 478.

*Buttfield v. Stranahan*, 192 U. S. 470.

*U. S. v. Bopper*, 98 Fed. Rep. 423.

*State v. Cardwell*, 81 S. E. 628, 632. (Opinion of Chief Justice Clark.)

*West Virginia v. Adams Express Co.*, (C. C. A.), 219 Fed. Rep. 794.

## II.

NEITHER THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION NOR THE "DUE PROCESS" CLAUSE OF STATE CONSTITUTIONS GUARANTEE TO A CITIZEN THE RIGHT TO RECEIVE AND POSSESS INTOXICATING LIQUORS FOR PERSONAL USE IN UNLIMITED QUANTITIES, OR IN ANY QUANTITY, AS AGAINST THE EXERCISE OF THE POLICE POWER BY THE STATE. THERE IS NO SUCH GUARANTY TO A CITIZEN OF WEST VIRGINIA IN THE CONSTITUTION OF THAT STATE AS AMENDED JULY 1ST, 1914.

We propose to develop the propositions just stated, in paragraphs to follow, under appropriate heads.

# 1. ALCOHOL AS A BEVERAGE IS INHERENTLY HARMFUL AND DANGEROUS.

At this point we quote an extract from an article on "LEGAL ASPECTS OF PROHIBITION," by Herbert C. Shattuck, A. B., LL. B., of the New York Bar, in "Case and Comment" for December, 1913, page 641, as follows:

"The basic fact underlying all agitation for the restriction or prohibition of the traffic in intoxicating liquors is *that alcohol, the essential ingredient of those liquors, is inherently harmful and dangerous when used as a beverage.* The scientific accuracy of this statement now seems to be generally recognized. The public schools of the nation teach it. Alcohol is a waste product in the activity of the yeast plant, (C. F. Hodge, Clark University, 'Physiological Aspects of the Liquor problem'), an excrement of the yeast fungus, a parasite which is midway between a plant and an animal.—(T. Alexander McNicoll, M. D., New York, Vice President American Medical Soc. for the study of Alcohol and other Narcotics.) *Alcohol is an active poison to the nervous system.*—1 Wharton & S. Med Jr., 5th Ed. Sec. 921.) *It ranks with other poisons like strychnine, arsenic, and opium.*—(Sir Andrew Clark, Physician to Queen Victoria.) *If it is a food, it is a poisoned food.*—(Dr. F. Peterson, New York.)

"This dangerous character of alcoholic liquors is recognized also by the courts. They have declared that intoxicating liquor in its nature is dangerous to the morals, good order, health and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life.—(*State ex*

*rel George v. Aiken*, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92.

"If then alcohol is a dangerous drug, it is but natural that the traffic in alcoholic liquors should not be considered in the same light as business of other kinds, but should be separated from them and be treated on its own merits. The courts recognize this fact. They say that intoxicating liquor is an article conceded to be fraught with such contagious perils to society that it occupies a different status before the courts and the legislatures from that of other kinds of property, and traffic in it is thereby placed upon a different plane from that of other kinds of business. There is therefore no question in cases dealing with intoxicating liquor, of the power of the legislature to say generally what beverage men shall drink or what they shall eat or wear. The discussion in these cases must deal solely with a distinct article of trade. —(*State v. Durien*, 70 Kan. 1, and 135, 78 Pac. 152 and 80 Pac. 987.)"

## 2. THE POLICE POWER OF THE STATE, AND ITS EXTENT.

(a) The police power belongs to the states, has not been surrendered by them to the general government nor restrained by the Constitution of the United States, and is essentially exclusive.

*Barbier v. Connolly*, 113 U. S. 273.

*In Re Rahrer*, 140 U. S. 545.

"It cannot be denied that the power of the state to protect the lives, health and property of its citizens and to preserve good order and the public mor-

als, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

*United States v. E. C. Knight Co.*, 156 U. S. 1.

"On the other hand, the power of Congress to regulate commerce among the several states is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several states, and if a law passed by a state in the exercise of its acknowledged powers comes in conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme."

*United States v. E. C. Knight Co.*, 156 U. S. 1.

Interstate commerce even in intoxicating liquors is national in character, and so long as Congress did not pass any laws to regulate it specifically in such a way as to allow the laws of the state to operate upon it, Congress indicated its will that commerce therein should be free and untrammelled. Hence, in the absence of Congressional action, laws prohibiting receipt and sale in original packages were inoperative.



*Bowman v. R. R. Co.*, 125 U. S. 465.

*Leisy v. Hardin*, 135 U. S. 100.

The Wilson Act of 1890 changed this situation in part.

*Rhodes v. Iowa*, 170 U. S. 412.

*Vance v. Vandercook*, 170 U. S. 438.

The Webb-Kenyon Act extended the prohibition against the introduction of liquors into a state by means of interstate commerce.

*Adams Express Co. v. Com. of Ky.*, 238 U. S. 190.

(b.) "It may be said in a general way that the police power extends to all the great public needs."

*Canfield v. U. S.*, 167 U. S. 518.

"It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Holmes, J., in *Nobles State Bank v. Haskell*, 219 U. S. 104.

"When a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

Hughes, Justice, in *Purity Extract & T. Co. v. Lynch*, 226 U. S. 192.

To the same effect are:

*Lawton v. Steele*, 152 U. S. 133.

*New York ex rel Silz v. Hesterberg*, 211 U. S. 31.

*Patson v. Penn.*, 232 U. S. 138.

*Booth v. Illinois*, 184 U. S. 426.

*Otis v. Parker*, 187 U. S. 607.

*Murphy v. California*, 225 U. S. 623.

The foregoing principle has been applied by the Supreme Court to prohibitions against *possession* of certain things as a proper means to accomplish an ulterior valid purpose.

*New York ex rel Silz v. Hesterberg*, 211 U. S. 31.

*Lawton v. Steele*, 152 U. S. 133.

*Patson v. Penn.*, 232 U. S. 138.

(c.) Intoxicating liquors are a subject of commercial intercourse between the states, yet state prohibitory laws within a state do not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or its amendment. The right of the states under the police power to regulate, restrain, or forbid the manufacture or sale of intoxicating liquors has been fully established by the Supreme Court.

*In Re Rahrer*, 140 U. S. 545.

*Foster v. Kansas*, 112 U. S. 201.

*Mugler v. Kansas*, 123 U. S. 623.

*Boston Beer Co. v. Mass.*, 97 U. S. 25.

*Kidd v. Pearson*, 128 U. S. 1.

*Crowley v. Christensen*, 137 U. S. 91.

A state may prohibit the sale of non-intoxicating malt liquors if the legislature deems it a necessary means to suppress the trade in intoxicants.

*Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, and the cases cited.

A state may constitutionally prohibit or regulate the receipt and possession of intoxicating liquors by a citizen even when for his own use; and since the Webb-Kenyon Law this principle will apply to such liquors moving into the state from another state.

*Southern Express Co. v. Whittle*, (Ala.) 69 So. Rep. 652.

*Ex parte Crane*, (Idaho), 151 Pac. 1006.

*Glenn v. Southern Express Co.*, (N. C.), 87 S. E. 136.

*U. S. v. Oregon-W. R. & N. Co.*, 210 Fed. 378.

*Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639.

*Heyward v. Henderson*, 109 Ga. 373; 47 L. R. A. 36, per Cobb, J.

The state may prohibit the solicitation of orders for intoxicating liquors and also the advertising of such liquors, although the liquors if purchased are in another state and would have to be brought into the state, making the prohibition, in interstate commerce.

*Delmater v. South Dakota*, 205 U. S. 93.

*State v. Delaye* (Ala.), 68 So. Rep. 993.

*State v. Davis*, (West Virginia), decided November 30th, 1915.

A prohibition state may make it unlawful for any person, firm, association, or corporation, whether a common carrier or not, to convey or transport liquors over or along any public street or highway for another, and may also prohibit the transportation of liquors from one part of the state to another.

*Williams v. State*, 179 Ala. 51.

*Western of Alabama Railway v. Brewing Co.*, 177 Ala. 149.

A prohibition state may also prohibit the keeping or storage of liquors in social or farternal clubs, even when it is for the personal use of the members thereof.

*Wallace v. State*, 8 (Ala.) App. Ct. Rep. 386, 62 So. Rep. 365.

*State v. Phillips*, (Miss.), 67 So. Rep. 651.

*State v. Topeka Club*, 82 Kans., 756; 109 Pac. 183.

In *Bowman's Case*, 125 U. S. 465, which was a case involving intoxicating liquors, Field, Justice, in a concurring opinion said that the state may regulate or prohibit *the sale or use* of an article for the protection of the health, morals, and safety of the people.

In the same opinion, Mr. Justice Field further said:

"But those powers which authorize legislation touching the health, morals, good order, and peace of their people were not delegated, and are so essential to the existence and prosperity of the states, that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise

"How can these reserved powers be reconciled with the conceded power of Congress to regulate interstate commerce? As said above, the state cannot exclude an article from commerce, and consequently from importation, simply by declaring that its policy requires such exclusion; *and yet its regulations respecting the possession, use and sale of any article of commerce* may be as minute and strict as required by the nature of the article and the liability of injury from it, for the safety, health, and morals of its people."

Further on in the opinion, (speaking of *Mugler v. Kansas*), Mr. Justice Field said:

"Assuming, therefore, as correct doctrine that the right of importation carries the right to sell the article imported, the decision in the *Kansas case* may perhaps be reconciled with the one in this case by distinguishing the power of the state over property created within it, and its power over property imported—its power in one case extending, for the protection of the health, morals, and safety of its people, to the absolute prohibition of the sale or use of the article, and in the other, extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the state."

This, of course, was said before the enactment of the Wilson Act or of the Webb-Kenyon Act, it being the purpose of the latter to allow the police power of the state to have full operation over intoxicating liquors without being dominated by the "commerce clause" of the Federal Constitution; or, in other words, to permit the states to as fully regulate or prohibit the receipt, possession, use, and sale, of intoxicating liquors as if the "commerce clause" were not included in the Federal Constitution.

If a state has the right to prohibit the manufacture of intoxicants for one's own use, and the right to prohibit the sale thereof to a citizen for his own use, it must also, upon the same grounds and for the same reason, have the right to prohibit the introduction into the state, and hence, the use and possession of such intoxicants, if the protection of the Federal Constitution be by Congress withdrawn from such shipments.

In *Brown v. Maryland*, 12 Wheaton 420, Chief Justice Marshall said:

"There is no difference in effect between the power to prohibit the sale of an article and a power to pro-

hibit its introduction into the country, the one would be a necessary consequence of the other."

Congress would have the power, if it desired to exert it, to exclude altogether ardent spirits from commerce among the states. This is shown by a paragraph from the opinion of Mr. Justice Harlan, speaking for the court, in *Champion v. Ames*, 188 U. S. 321, 362, as follows:

"Thus, under its power to regulate interstate commerce, as involved in the transportation, in original packages, of ardent spirits from one state to another, Congress by the necessary effect of the Act of 1890 made it impossible to transport such packages to places within a prohibitory state and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, should be imported into a state and sold in the original packages, despite the will of the state. *If at the time of the passage of the Act of 1890, all the states had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the states; for no one would ship, for purposes of sale, packages containing such spirits to points within any state that forbade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the 'Rahrer Case' a recognition of the principle that the power of Congress to regulate interstate commerce may some times be exerted with the effect of excluding particular articles from such commerce.*"

(d). In *Holden v. Hardy*, 169 U. S. 363, involving the validity of a statute of Utah, limiting the period of em-

ployment of workmen in underground mines, or in the smelting, reduction or refining of oils or metals, to eight hours a day, the statute was held to be a valid exercise of the police power of the state.

Mr. Justice Brown, speaking for the court, said:

"The right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police power. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to the enormous increase in occupations which are dangerous or so far detrimental to the health of employees as to demand special precaution for their well-being and protection, or the safety of adjacent property.

\* \* \* \* \*

"While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. *Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited or made subject to stringent police regulations.* The power to do this has been repeatedly affirmed by this court."

In the same case, it was shown that an individual under the police power may be protected by the state from himself, and that the state has an interest in the well-being of the individual:

"But the fact that both parties are of full age and competent to contract does not necessarily deprive

the state of the power to interfere where the parties do not stand upon an equality, *or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all of the parts, and when the individual health, safety or welfare is sacrificed, or neglected, the state must suffer.*"

### 3. THE REAL PURPOSE OF PROHIBITION LEGISLATION IS TO PREVENT PERSONAL USE OF LIQUOR.

It seems strange at this late day to hear a claim made that the state and national governments guarantee to a citizen the right to possess and receive liquor for personal use and to drink the same in unlimited quantities. If such had been the case, it is difficult to see how any sort of prohibitory law could have ever been sustained, since all of them have a direct tendency to reduce or prevent the use of intoxicating beverages, and it is the purpose of all of them to promote temperance by the prevention of the consumption of intoxicants. This purpose has found repeated expression in adjudged cases.

In the early case of *Lincoln v. Smith*, 27 Vermont 328, we find the following statement:

"Though the act of our legislature is entitled an act 'to prevent the traffic in intoxicating liquors for the purpose of drinking,' *yet the primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be at-*



*tained.* If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals and productive of pauperism and crime; it seems to us, that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations. The legislature in passing the law in question, doubtless supposed *that the traffic and drinking of intoxicating liquors went hand in hand, and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that by cutting off the one, the other would also fall with it.* Whether the drinking of intoxicating liquor tends to produce intemperance, and whether intemperance is a gangrene, tending to corrupt the moral health of the body politic, and to produce misery and lamentation; and whether the law in question is well calculated to cut off, or mitigate the evils supposed to flow *directly from intemperance, and indirectly from the traffic in intoxicating liquors,* were questions to be settled by the law-making power; and their decision in this respect is final, and not to be reviewed by us. It is clear the legislature assumed all this, in the passage of the law in question; and, in our passing upon its validity, we are not to assume the contrary."

In *Marks v. State*, 159 Ala. 71, speaking of local and general prohibitory statutes, Mayfield, Justice, said:

"The main object and purpose of all is the same. Some may be restricted, and some more extensive and exclusive than others; but the main object and

purpose of all, as said by Justice Somerville in *Carl's* case, 87 Ala. 17, 6 South. 118, 4 L. R. A. 308 is to 'promote temperance and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors. *The evil to be remedied is the use of intoxicating liquors as a beverage*, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and the object of the law in this particular must not be lost sight of in its interpretation.' "

This utterance is re-affirmed by the Supreme Court of Alabama in *Southern Express Co. v. Whittle*, (Ala.), 69 South. Rep. 652.

In *State v. Phillips*, (Miss.), 67 South. Rep. 651, the court said:

*"If the object of prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the*

final step, the way will be found to accomplish the end."

In *West Virginia v. Adams Ex. Co.*, 219 Fed. 794, the same thought is thus expressed:

"In trying to comprehend the legislative purpose in prohibition statutes, it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, *but the prevention of their consumption as a beverage*. The sale being the most usual and obvious means by which drinking is accomplished, the legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

(Maine.) "It is common knowledge that it is the use of intoxicating liquors as a beverage that is deemed harmful, and is the mischief sought to be prevented by the legislation. The prohibition of the sale and keeping for sale of intoxicating liquors is only a means. The end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the state. The legislation upon the subject, including the statute in question in question, should be con-

strued to further that end, so far as the language, without bending either way, fairly allows."

*Maine v. Bass. Pub. Co.*, (Me.), 71 Atl. 894, 20 L. R. A. (N. S.) 495, 496.

(California.) "It cannot for a moment be doubted that the great ultimate object of all legislation on the subject of intoxicating liquors is as obviously true of the statute in question, to reduce to the lowest limit the individual use and consumption of such liquors as beverages, and thus diminish intemperance. \* \* \* Indeed, it is, as before intimated, within the constitutional rights of the legislature in the exercise of the police power of the state, to establish any regulation *which may tend to remove every temptation to use intoxicants as beverages under any circumstances.*"

*Golden & Co. v. Justice's Court*, (Cal.), 140 Pac. 49.

In *Crowley v. Christensen*, 137 U. S. 87, it was urged, that if injury followed the use of liquors as a beverage, it was voluntarily inflicted and confined to the party offending; and hence the sale should be without restriction, upon the theory that what a man shall drink, equally with what he shall eat, is not properly a matter for legislation; but the court did not accept the suggestion as sound. Mr. Justice Field, speaking for the court, saying:

*"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit under-*

mines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, *it affects those who are immediately connected with and dependent upon him.*"

The case of *Mugler v. Kansas*, 123 U. S. 623, is clearly fatal to the claim that under the police power, the use and consumption of liquors by a citizen may not find any interference. It was contended in that case, that among the rights guaranteed to a citizen by the constitutional provision protecting persons against being deprived of life, liberty, or property without due process of law, is the right of manufacturing for one's own use either food or drink; that while according to the doctrines of the Commune, the state may control the tastes, appetites, habits, dress, food and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

But this contention found no favor with the court, which declared that if a state deems the absolute prohibition of the manufacture and sale, within her limits of intoxicating liquors for other than medicinal, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot override the will of the people as thus expressed. Hence, it was declared that if in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use

of such liquors, it is not for the courts upon their view as to what is best and safest for the community, to disregard the legislative determination of that question.

Now if the end and object of this legislation is to prevent the consumption of intoxicating liquors as a beverage or to restrict the consumption thereof, and if the evil to be remedied is the use of intoxicating liquors as a beverage, and this end and purpose be a proper one, why may not the legislature, if in its judgment it is proper and necessary, so to proceed, directly declare it shall be unlawful for a citizen to acquire property in, or to own or possess intoxicating liquors? Must a state act by indirection? May not a state accomplish directly what it is right to accomplish indirectly? Why make an exception in such a case to the general rule that what may be accomplished indirectly, may be accomplished directly.

It results from the authorities above cited that the Federal Constitution contains no guaranty to a citizen of a state or of the United States, that he must somewhere be able to obtain intoxicating liquors for personal use, so far as the 14th Amendment is concerned; nor has he any such right under the "commerce clause" since the Webb-Kenyon Act, if a valid state law would be infringed by the receipt or possession of liquor for personal use.

#### 4. EXTENT OF POLICE POWER RESPECTING PERSONAL USE OF LIQUORS FURTHER CONSIDERED.

If a state has the right to prohibit the manufacture of intoxicating liquor by a citizen for his own use, every other state in the Union has, or may have, the same right. Hence, if all the states would pass laws prohib-

iting the manufacture by a citizen of intoxicating liquors for his own use, and prohibit the sale of such liquors within its borders to a citizen for his own use, what would become of the supposed right of a citizen to secure liquor for his own use? Or, what would become of such right, if Congress should exercise its well-settled power to exclude all intoxicating liquors from interstate shipment? Or, what would become of his right, if the Federal government should prohibit the importation of intoxicating liquors into this country, after all the states had prohibited its manufacture?

If a citizen of a state has the right to obtain intoxicating liquors for his own use in any quantity, or in unlimited quantities, it would seem to follow he should at least have the right to manufacture such liquor for his own use from the products of his own labor, and yet it is settled he has not such right.

Is the supposed constitutional right of a citizen to have liquor to be dependent upon the state of legislation in another state, or the state of legislation by Congress?

Are the laws of a state prohibiting the manufacture of intoxicating liquors by a citizen for his own use, and the sale of such liquors in a state for the use of the purchaser, constitutional and valid only so long as a way is left open for the securing by the citizen of intoxicating liquors elsewhere, either in the United States or in some foreign country?

If a person has a constitutional right to purchase intoxicating liquors for his personal use, the seller would seem to have the constitutional right to sell it for such purchaser's personal use, and yet it is settled that no one has a constitutional right to sell intoxicating liq-

uors. Such a right is not one of a citizen of a state, or of a citizen of the United States.

The person who sells liquor to a purchaser may sell it for the purchaser's own use, and yet the state has the power to deprive the latter of the right to purchase, by prohibiting any one to sell liquor to him. It would seem, therefore, clear that if a citizen may not manufacture liquor for his personal use, then he has not the constitutional right to purchase or receive such liquors for his own use, especially when such purchase or receiving is a violation of the law by the person selling or delivering such liquor.

Furthermore, this court, in *Mugler v. Kansas*, sustained a provision broad enough to prohibit the manufacture of liquor for personal use, since a contrary ruling might have defeated the entire scheme of prohibition as embodied in the laws of Kansas. The meaning was that if such privilege were recognized, the consumption of liquors would be but little restricted, since large stocks would be manufactured under the pretence of the need of them for personal use, and then could be made an instrument of defeating the law against sale.

To accomplish the admittedly valid main purpose of prohibiting the traffic in liquors, it is necessary for a state, under its police power, to have the right to control interstate shipments even for personal use. This is a step which has a fair relation to the end to be accomplished. What is the difference in principle between the denial of the right to manufacture, and a denial of the right to import?

This line of reasoning was adopted by District Judge Bean (former Chief Justice of Oregon) in *U. S. v. Oregon-Wash. Rail & Nav. Co.*, 210 Fed. Rep.



The same principle was laid down by the Supreme Court of Alabama in *Southern Express Co. v. Whittle*, 69 South. Rep. 652, and approved and re-affirmed by the Supreme Court of North Carolina in *Glenn v. Southern Ex. Co.*, 87 S. E. 136.

The principle for which we are contending under the police power was announced at an early date, in *Preston v. Drew*, 33 Me. 558, 54 Am. 639, where Shepley, C. J., said:

"The state, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.

"It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious and suited to produce, by a greater use, serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience to law; to disturb the peace, and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In *Heyward v. Henderson*, 109 Ga. 373, 47 L. R. A. 36, 77 Am. St. Rep. 384, the court dealt with a municipal

ordinance making penal the buying of alcoholic liquor. It was held that without express legislative authority, the city under the general welfare clause of its charter could not enact such an ordinance, since the Legislature of the state had never adopted the policy of forbidding the buying of such liquor. And yet, upon the question now under consideration, Judge Cobb, speaking for the court, said:

"It may be that the state would have a right to prohibit the purchase of whiskey; that the state has a right to prohibit absolutely the sale of whiskey is no longer an open question either in this court or in the Supreme Court of the United States." And furthermore, "It may be contended with great force, that if the state, notwithstanding his recognized property right in alcoholic liquors, can under its police power entirely destroy the right of the owner of said liquors to sell or dispose of the same within the limits of the state, which would in some instances be a practical confiscation of the property, it has the power to declare that no person shall by purchase come into possession of such property within the limits of the state. Laws prohibiting the sale of whiskey are upheld as constitutional, upon the ground that its sale is against the best interest of the public at large, and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and good order of society, as well as the welfare of individuals. *If this be true*, it would seem to follow that the state might enact any law which would effectually prohibit the traffic. A law prohibiting the sale would, if effectually enforced, prohibit the buying; and so also, the prohibition of the purchase would likewise prohibit the sale. The prohibition of the sale, therefore, puts a ban upon the entire traffic. Of course, a law mak-

ing penal the sale would not, without more, make penal the buying; but the practical effect of such a law, if enforced, would be to prohibit the buying. It would seem to follow, therefore, that the state might go further than it has already gone, and make penal the buying."

In *So. Ex. Co. v. High Point*, (N. C.), 83 S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

"There is nothing in the state or Federal Constitution which prohibits the people of North Carolina, speaking through the legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in *Mugler v. Kansas*, 123 U. S. 623, it following that the legislature can equally prohibit the importation of such liquors by any person for his own use; and *a fortiori*, it can forbid a common carrier to bring in or import such liquors, irrespective of whether it is for the consignee's *own use or not*."

5. STATE DECISIONS, SUSTAINING RECENT STATE LAWS, WHICH ARE CONTRARY TO APPELLANT'S CONTENTION AS TO RIGHT OF A CITIZEN TO RECEIVE AND POSSESS LIQUORS FOR PERSONAL USE.

ALABAMA.

The Legislature of Alabama at its recent session passed a law, effective February 8th, 1915, containing, among others, the following provision:

"Section 12. That it shall be unlawful for any person, firm, or corporation, (1) to receive or accept

delivery of, or to possess or to have in possession at one time, whether in one or more places, and whether in original packages or otherwise, more than one-half gallon of spirituous liquors, or more than two gallons of vinous liquors, or more than five gallons of malted liquors, when in kegs, or more than sixty pints when in bottles, or more than one gallon of any other intoxicating or fermented liquors beyond those thus enumerated; or (2) to receive, accept delivery of, possess or have in possession, more than one gallon of spirituous liquors, or four gallons of vinous liquors, or more than ten gallons of malted liquors, including beer and ale when in kegs, or one hundred and twenty pints in bottles, or more than two gallons of any other fermented or intoxicating liquors beyond those enumerated, within any four consecutive weeks, whether in one or more places."

The statute applies to liquors no matter when, how, or whence obtained.

This statute was assailed by one Whittle, a liquor dealer of Pensacola, Florida, who sought to compel the Southern Express Company to receive for delivery in Alabama, six quarts of whiskey for personal use.

The Supreme Court held that the Express Company properly refused to accept the same for shipment, because it was intended to be received by the consignee, farmer, in violation of the limitation of one-half gallon of spirituous liquors at one time, prescribed by the terms of said section 12.

The whole court held that section 12 was valid, and that it offended no provision of either the state or Federal Constitution. The opinion contains an elaborate consideration of the questions involved, and the case is re-

ported as *Southern Express Co. v. Whittle*, (Ala.), 69 South. Rep. 652. We invite the court to a careful reading and consideration of the opinion, and extract from it the following:

"If the right at common law to manufacture an intoxicating liquor for one's own personal use, out of one's own materials, by the application of one's own personal effort, may be forbidden by appropriate legislation under the police power, as was expressly ruled in *Mugler v. Kansas*, supra, it cannot be logically or soundly asserted that the receipt or possession of more than a specified quantity at one time may not be forbidden by statute; especially when the sale or other disposition of intoxicants is forbidden in the state's effort to promote temperance and to suppress the evils of intemperance by visiting its power upon one of the means usually productive of intemperance, viz., the traffic therein; or, as has been before quoted from our *Marks* and *Carl* cases (ante), to remedy the evil present in 'the use of intoxicating liquors as a beverage.' The power confirmed in *Mugler v. Kansas* must necessarily comprehend the lesser manifestation of a like power, by regulating the quantity to be received or possessed at one time in 'dry territory' in the state. Furthermore, it would appear to be but the assertion of a self-evident truth to say: that since one may be validly forbidden to *sell* his intoxicating liquors to another, that other may be validly forbidden to buy the article from him; and, if one may be validly forbidden to sell, and necessarily validly forbidden to *deliver* the article, to another, that other may be validly forbidden to accept delivery. As to the seller, the prohibitions stated would operate upon him and upon his property, but not in the sense or with the

effect of infringing any constitutional right or immunity. (*Dorman's case*, supra): whereas, in the latter case, the buyer, the prohibition would operate in anticipation, qualifying his right—in the interest of the public welfare as determined by the authority, the law-makers, with which the decision in such circumstances rests—to acquire a property interest in the article above a defined quantity at one time.”

The Supreme Court of Alabama also considered the statute as a means to the enforcement of the prohibition law against the sale of liquors. After citing with approval the cases of *Patson v. Penn.*, 232 U. S. 138, *Silz v. Hesterberg*, 211 U. S. 31, and *Lawton v. Steele*, 152 U. S. 133, in which *possession of certain personal property* was held to be validly prohibited as a means to the accomplishment of an ulterior valid purpose,

McClellan, Justice, speaking for the court, proceeded further to say:

“In *Delamater v. South Dakota*, 205 U. S. 93—recently followed and applied by this court in *State v. Delaye*, in Manuscript (68 South. Rep. 993)—the Supreme Court vindicated an enactment forbidding the solicitation of orders for intoxicants by a non-resident of the state. This court had already, in *Moog v. State*, 145 Ala. 75, sustained such a law as applied to residents of the State. The remedy for an admitted evil, viz., the use of intoxicants as a beverage, was found to fairly include the act of soliciting orders. The insistence strikingly illustrates the authorized progress manifested by and for the exercise of the police power of the state, and the recognition by the courts of the fact that all commands or prohibitions ancillary and reasonably related to the state's pur-

pose to promote temperance and to suppress the evils of intemperance, whether through the prohibition of the traffic as the chief means to that end or not, cannot be thwarted or annulled on any idea that constitutional rights are thereby violated or invaded."

This case is also interesting in that the court declared that the case of *Eidge v. City of Bessemer*, 164 Ala. 559, (one of the cases relied upon by appellant's counsel in his brief on the former hearing), was not an authority against the validity of the Alabama statute, and the court gave the reasons why said case was not a governing authority, one of the reasons being that the case involved the ordinance of a municipality and not a statute of the state, the ordinance going beyond and in advance of any state statute then of force.

The Supreme Court of Alabama also disapproved of the majority view in *State v. Williams*, 146 N. C. 618, the decision being in the opinion of the court unsound.

The court also declared its decision in *Williams v. State*, 179 Ala. 51, to be opposed to the doctrine of *West Virginia v. Gilman*, 33 W. Va. 146.

The state of Georgia has also enacted a statute identical in principle with the Alabama statute as to receipt and possession of liquors; the Georgia law will become effective May 1st, 1916.

#### NORTH CAROLINA.

In March, 1915, the General Assembly of North Carolina enacted a statute, section 1 of which made it unlawful for any person whatever to deliver, in any manner or

by any means whatsoever, for hire or otherwise, in one or more packages, at one time, from a point within or without the state, to any person, firm, or corporation in the state, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons; and by sections 2 and 3 made it unlawful for any person, firm or corporation at one time or in one or more packages, to receive at any point within the state, for his or her use, or for the use of any person, firm or corporation, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons, within fifteen days.

This statute has been unanimously sustained by the Supreme Court of North Carolina in the case of *Glenn v. So. Ex. Co.*, (N. C.), 87 S. E. Rep. 136. The court in that case, after sustaining the Webb-Kenyon Law, expressly approved and followed the Alabama decision of *So. Ex. Co. v. Whittle*, supra, and quoted from the opinion, with approval, the paragraph from the Whittle case which is hereinabove set forth.

The case of *State v. Williams*, 146 N. C. 618, had been relied on as an authority against the validity of said statute, but the court declared that the question involved was not raised or decided in the *Williams case*; and thereby the Supreme Court of North Carolina removed said *Williams case* as any authority for the appellant's contention upon the present record.

The *Williams case* itself was decided by a divided court, and the Supreme Court of Mississippi in *State v. Phillips*, (Miss.), 67 South. Rep. 651, expressed a preference for the opinion of Chief Justice Clark in that case, wherein the learned Chief Justice expressed himself as follows:



"In limiting each person to a half gallon per day for his own use (for the law permits no sale) the Legislature was not niggardly. Besides, if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county, can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than a half gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the legislature, subject only to review by the people, not by the courts."

In *Van Winkle v. State*, (Del.), 91 Atl. 381, the Supreme Court of that state considered a statute almost identical with that involved in *State v. Williams*, 146 N. C. 618, in the following words: "That it shall be unlawful for any person to carry, bring, or have brought, any quantity of spirituous, vinous, or malt liquors from one point within the state of Delaware into local option territory within said state, greater than one gallon, within the space of twenty-four hours;" and the court held that the act did not amount to an abridgement of the privileges guaranteed to citizens by the 14th Amendment to the Federal Constitution, for the reason given in that part of the opinion by the Court of General Sessions, involving the statute, in *State v. Grier*, 88 Atl. 579. The Court of General Sessions in the case referred to wrote a careful opinion upon the subject, with the later authorities, and thoroughly demonstrated the validity of said Delaware statute.

## SOUTH CAROLINA.

On February 20, 1915, the Legislature of South Carolina enacted a statute containing the following pertinent sections:

"Section 1. Be it enacted by the General Assembly of the State of South Carolina that it shall be unlawful for any person, firm, corporation, or company, to ship, transport, or convey any intoxicating liquors from a point without this state into this state, or from one point to another another in this state, for the purpose of delivery, or to deliver the same to any person, firm, corporation, or company within this state, *or for any firm, person, corporation, or company, to receive* or be in possession of any spirituous, vinous, fermented or malt liquors or beverages containing more than one per cent. of alcohol, for his, hers, its, or their own use, or for the *use of any other person, firm, or corporation, except as hereinafter provided.*

"Section 2. Any person may order and receive from any point without the state not exceeding one gallon within any calendar month, for his or her personal use, of spirituous, vinous, fermented or malt liquors or beverages.

"Section 7. Any person violating any of the provisions of this act shall be subject to a fine of not less than one hundred dollars or imprisonment for not less than three months, or both, in the discretion of the court."

This statute has not been passed on by the Supreme Court of South Carolina as yet, but we think a previous

decision of that court leads to the conclusion that the statute will be sustained as a valid police regulation, bringing into operation the Webb-Kenyon Law against liquor proposed to be shipped into South Carolina in excess of the statutory quantity.

In *Atkinson v. Southern Ex. Co.*, 94 S. C. 44, 78 S. E. 516, 48 L. R. A. (N. S.) 349, the court said that the legislature of South Carolina had the power to adopt a statute having the prospective effect of "prohibiting alcoholic liquors from being imported into this state. Such a statute would not contravene any provision of the United States Constitution. As we have already said, the recent act of Congress divests intoxicating liquors of their interstate character and invests the respective states with the power either to prohibit importation absolutely or to allow it only for sale and use through a dispensary."

#### IDAHO.

In *Ex parte Crane*, (Idaho), 151 Pac. Rep. 1006, there was involved the validity of a statute of Idaho making it unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession, any intoxicating liquors except as in the act provided, or to have in his possession any intoxicating liquors of any kind for any use or purpose except the same has been obtained and is so possessed under a permit authorized by the act.

It was agreed that the petitioner, Crane, had in his possession in Latah County, a prohibition district, a quantity of liquor for his own use, and not for sale or gift.

It was contended that the statute was a violation of section 1 of the 14th Amendment to the United States Constitution, that it was not a reasonable exercise of the police power of the state, and that it violated a section of

the Idaho Constitution as follows: "No person shall be deprived of life, liberty, or property, without due process of law."

After citing, among other cases, *New York ex rel Silz v. Hesterberg*, 211 U. S. 31, and quoting from *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, and from *Mugler v. Kansas*, 123 U. S. 623, the court then referred to the following cases that had been cited against the statute and which the court said "will disclose more of argument against the wisdom of such legislation as this than of reason why the aid of the courts may be invoked to defeat it:"

*Ex parte Wilson*, 6 Okl. Cr. 451, 119 Pac. 596.

*Com. v. Campbell*, 133 Ky. 50; 107 S. W. 383; 24

L. R. A. (N. S.) 172.

*State v. Gilman*, 33 W. Va. 146; 10 S. E. 283; 6

L. R. A. (N. S.) 847.

*State v. Williams*, 146 N. C. 618; 61 S. E. 61; 17

L. R. A. (N. S.) 299.

Thereupon the court expressed its conclusion as follows:

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power, and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted, that if the possession of such liquor 'can by no possibility injure or affect the health, morals, or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor the

sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession,' and since great difficulty has been encountered in enforcing the prohibitory laws, the statement made by the learned jurist in the case of *Mugler v. Kansas*, supra, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage, might well be said with respect to its possession, which would make it read:

"And so, if in the judgment of the legislature, the possession of intoxicating liquors \* \* \* would tend to cripple, if it did not defeat the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question.'

"We have reached the conclusion that this act is not in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States, nor of section 13, article 1, of the Constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals, and the public safety; that it has a real and substantial relation to those objects; and that it is, therefore, a reasonable exercise of the police power of the state."

## WEST VIRGINIA.

Counsel for appellant in their reply brief upon the former hearing contended that under constitutional government as it exists in the United States, the regulation of the personal habits of the adult citizen not under a disability is not a function of government, and that certain regulations proposed by the West Virginia amendatory statute, approved February 5, 1915, are in violation of the fundamental law as set forth in both State and Federal Constitutions; they will no doubt make the same contention against the statute of May 24th, 1915.

Among other cases, some of which we have already noticed, they cited *State v. Gilman*, 33 W. Va. 146, and contended that the decision of the highest court of West Virginia in said case prescribed a rule of construction for the Constitution of that state which should be adopted here.

The *Gilman* case was decided under a provision of the Constitution in the following words: "Laws shall be passed, regulating or prohibiting the sale of intoxicating liquors within the limits of this state." Without conceding that the decision was a correct construction of that provision of the Constitution, it must be now said that the amendment, effective July 1st, 1914, entirely changed the constitutional situation in West Virginia in respect to the subject-matter in hand.

In *State v. Sixo*, (W. Va.), 87 S. E. 267, decided November 30, 1915, the court took occasion to refer to this change and to say of the case of *State v. Gilman*, that it is authority for the proposition that a statute of the kind involved was unconstitutional and void "*under the Constitution then in force*," and further, used the following language:

*"Since the case of State v. Gilman was decided the Constitution of the state has been amended. The Constitution as amended prohibits the manufacture and keeping for sale of malt, vinous and spirituous liquors, etc., and requires the legislature to 'enact such laws, with regulations, conditions, securities, and penalties as may be necessary to carry into effect the provisions of this section.' This amendment became effective July 1, 1914. It is the duty of the legislature to enact such laws as may be necessary to make effective this provision of the Constitution as amended. The legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the state, or carried from one place to another within the state, in quantities of one-half gallon or more, to be marked or labeled. Whether or not this is a wise policy is not for the courts to determine. If the legislature has not exceeded its powers, the courts cannot interfere. The courts may decide whether or not the legislature had the power to establish these regulations, but they cannot prescribe the policy if within the legislative limits; this would be to subordinate the will of the legislature to the opinion of the courts."*

The court then cited the case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, holding that a state, in dealing with a recognized evil which it is free to suppress, might adopt measures having reasonable relation to that end, although the inhibited transaction separately considered might be innocuous. The court therefore took a much broader view of the present Constitution of West Virginia than was taken by the court in the *Gilman* case of the Constitution, before amendment

Furthermore, in *State v. Davis*, (W. Va.), 87 S. E. 262, decided November 30th, 1915, it was held that

a provision against advertising liquors, under the Yost Act, was valid under the amended Constitution of West Virginia and that section 8 of the Yost Act of 1913 did not violate the "privileges or immunities" clause of the 14th Amendment to the United States Constitution.

It must be evident, therefore, that the *Gilman case* is no longer to be deemed an authority here, in view of the much broader field for legislative action under the grant of power contained in the West Virginia Prohibitory Amendment. No doubt it was because of the narrow view taken by the West Virginia court in the *Gilman case*, that the amendment was so framed that the legislature, without delay, was commanded "to enact such laws, with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of the section."

As to the decision in the *Gilman case* that the Act in question was offensive to the 14th Amendment to the Federal Constitution, we must say that the view of the West Virginia court was too narrow and hence entirely out of harmony with subsequent decisions of the Supreme Court of the United States, which will be followed now.

*New York v. Hesterberg*, 211 U. S. 31.

*Patson v. Penn.*, 232 U. S. 138.

*Purity Ex. & T. Co. v. Lynch*, 226 U. S. 192.

*Mugler v. Kansas*, 123 U. S. 623.

It thus appears that three cases which have been often cited in litigation of this character, and which were relied on by appellant's counsel in their former reply brief, have been so explained and limited by the courts in which said cases arose, that appellant's counsel can no longer call them to their assistance as authorities; and the decisions which accomplished this result have all been ren-



dered since the former submission of this cause; that is to say, *Eidge v. City of Bessemer*, 164 Ala. 599, has been superseded by *Southern Ex. Co. v. Whittle*, (Ala.), 69 South. Rep. 652; *State v. Williams*, 146 N. C. 618, has been explained, limited and superseded by the case of *Glenn v. So. Ex. Co.*, (N. C.), decided December 1st, 1915; and *State v. Gilman*, 33 W. Va. 146, has been explained, limited and superseded by the cases of *State v. Sixo* and *State v. Davis*, 2895 and 2864 supra.

## 6. CASES FROM KENTUCKY AND OKLAHOMA REVIEWED.

### KENTUCKY.

We need only refer to the Kentucky case of *Com. v. Campbell*, 133 Ky. 50, 24 L. R. A. (N. S.) 172, since the later cases from that state but follow the earlier decision. The *Campbell* case shows very plainly that it was controlled primarily by the construction which the Court of Appeals of Kentucky placed upon certain sections of the Kentucky Constitution, the court saying expressly, it could not believe that the framers of the Constitution intended to carefully take from the legislature the power to regulate the sale of liquors, and yet leave with that department of the state government, the greater power of prohibiting the possession or ownership of liquor.

The court further said that since the adoption of the then Constitution, containing a bill of rights in language which the court set forth, the guaranties to the citizen would be only empty sound, if the legislature could prohibit the citizen the right to own or drink liquor when in so doing he did not offend the laws of decency by *being intoxicated in public*, the view of the court seeming to be that a citizen of Kentucky could not enjoy the inalienable rights declared by the Constitution unless he were

permitted freely to become intoxicated *in private* and to there consume intoxicating liquors in unlimited quantities.

The decision of the Kentucky court, thus resting upon provisions of the state Constitution and upon an extremely narrow view of the police power of the state, would be a very unsafe guide to this court in construing the present Constitution of West Virginia establishing state-wide prohibition for that state, and conferring upon the legislature full power to pass all laws necessary to make the state's policy effective.

The further general remarks in the Kentucky case about the rights of man in his natural state, and the rights of society over the individual, are clearly antagonistic to the principles declared by this court in the cases of *Mugler v. Kansas*, *Crowley v. Christensen*, *Purity Extract & Tonic Co. v. Lynch*, and *Holden v. Hardy*, which have all been cited and considered.

The Kentucky court in the *Campbell* case also noted that a potent force of the Constitutional Convention of Kentucky was composed of those engaged in the business of manufacturing and selling liquors. It could not be said that the West Virginia Prohibitory Amendment was inspired or adopted by persons engaged in the liquor traffic, but rather by those totally opposed to the traffic and bent upon its utter destruction in West Virginia; the amendment conferring upon the legislature ample power to enact all laws necessary to accomplish the desired end.

## OKLAHOMA.

The case of *Ex parte Wilson*, 6 Okl. Cr. 451, 119 Pac. 596, was cited but not followed in the Idaho case, *Ex parte Crane*, 151 Pac. 1006; we deem it proper, however, to briefly refer to the decision.

The case was decided December 18th, 1911, prior to the passage of the Webb-Kenyon Act.

The agreed facts were that the defendant for a long time had been engaged in the livery business in Ardmore, and that he had there in his possession on the dates alleged, a quantity of liquor shipped to him from Fort Worth, Texas, for his own use, in excess of the quantity permitted to be possessed by a citizen of Oklahoma by the statute under consideration by the court.

Under these facts, it is true that the defendant was improperly convicted, for the reasons stated in the last paragraph of the opinion based upon the case of *Vance v. Vandercook Co.*, 170 U. S. 438, which held, under the Wilson Act, that a citizen had the right to import liquors from another state, to have it delivered to him; and to keep it for his own use. This point was conclusive of the case and there was no occasion to consider the statute of Oklahoma as brought to the test of the police power under the state Constitution, or to the test of the 14th Amendment to the Federal Consitution.

In so far as the court held generally (without regard to interstate commerce) that the statute was offensive to the 14th Amendment, and to section 7 of article 2 of the State Constitution, providing that "no person shall be deprived of life, liberty or property without due process of law," the decision was out of accord with the principles referred to and the numerous authorities cited in this brief.

The opinion is composed mostly of extracts from cases which we have reviewed, and it is easy to see the court was largely influenced by the case of *Eidge v. City of Bessemer*, 164 Ala. 599, and the cases therein cited, among others, *State v. Gilman*, 33 W. Va. 146, and *State v. Williams*, 146 N. C. 618, which appear now not to have been applicable and to have been misunderstood.

In adopting the view, furthermore, of the Kentucky court, the Oklahoma court failed to take note of the difference between the status of Kentucky and Oklahoma, since the latter was a state-wide prohibition state under the Constitution and under statutes as well; whereas the Constitution of Kentucky, as construed by the Court of Appeals of that state, had left no power in the legislature to regulate the sale of liquors.

Under the doctrine declared in the *Lynch case*, 226 U. S. 192, and in *Mugler v. Kansas*, 123 U. S. 623, the Oklahoma legislature clearly had the power to enact the statute in question as a means of enforcing the state-wide prohibition law; and it was valid except in so far as it might be applied to an interstate shipment, and since the Webb-Kenyon Law, the "commerce clause" no longer prevents its complete operation.

In view of the decisions of the Supreme Court of the United States, and of later decisions in other states where the Oklahoma court mainly found the authorities upon which it relied, we confidently expect, especially since the passage of the Webb-Kenyon Law, that the court will recede from its decision in the case of *Ex parte Wilson*, supra, if another opportunity be afforded it to more fully consider the questions involved.

**7. THE WEBB-KENYON LAW DOES NOT EXCLUDE FROM ITS OPERATION SHIPMENTS OF LIQUOR FOR PERSONAL USE, IF THE LIQUOR IS INTENDED TO BE RECEIVED, POSSESSED, SOLD, OR IN ANY MANNER USED CONTRARY TO THE LAWS OF THE STATE INTO WHICH THE LIQUOR IS SOUGHT TO BE INTRODUCED.**

The statement above plainly follows from an examination of the terms of the Webb-Kenyon Act itself, construed in reference to the evil which the Act intended to remove. The history of the Act shows this to be true.

As Senator Knox said in his report to the Senate in reference to legislation concerning interstate commerce in liquors:

"Congressional expression in favor of personal use would be an expression upon a subject with which Congress has nothing to do, and upon it all sorts of confusing question would arise."

As the Honorable A. Y. Webb, member of Congress from North Carolina, said in the House of Representatives on February 8th, 1913, in the debate upon the Webb-Kenyon Act:

"If the states have the right, in the first place, to prohibit the personal use or receipt of liquor, this Congress has no power to take that right away from the states. On the other hand, if the state has no power under its own Constitution or the Constitution of the United States to deprive a man of the right of the personal use of liquor, then this law is harmless as to such right, because the state can never take that right from him."—Page 2807, Vol. 49, Congressional Record.

Furthermore, the record shows that Mr. Blackmon of Alabama offered an amendment, making the act inapplicable to shipments for personal use, and the amendment was defeated by the following vote: Yeas, 55; noes, 149. (p. 2865.)

Mr. Bartlett of Georgia, proposed the following amendment:

*"Provided, however, that nothing in this act shall be held or construed to render illegal or subject to state control, the interstate shipment of liquors here-in defined, into any state or territory or district to any one for his personal or family use."*

This was defeated by the following vote: Yeas, 65, noes, 167. (Pages 2866-67.)

Thereupon the House voted down the amendment proposed by Mr. Davis of West Virginia, as follows:

*"But nothing in this act contained shall be construed to forbid the shipment or transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, intended for sacramental purposes or for the personal use or consumption of the owner or consignee thereof."*

Thereupon the bill passed the House: Yeas, 239; noes, 64. (Page 2867.)

This record should remove all doubt as to the purpose and intent of Congress in enacting the Webb-Kenyon Law, if indeed any possible doubt could arise. Congress intended that the prohibition of the act should exclude from the state liquors for personal use, if any state so willed, and manifested its wishes in a valid statute, falling within the terms of the act.

We will not extend this brief by any detailed analysis of several cases cited by and relied upon by appellant's counsel:

*Palmer v. Express Co.*, (Tenn.), 115 S. W. 236.

*Van Winkle v. Delaware*, 91 Atl. 385.

*Ex parte Peede*, (Tex.), 170 S. W. 749.

*Southern Express Co. v. State*, (Ala.) 66 South. Rep. 115, 188 Ala. 454.

*Southern Ex. Co. v. City of High Point*, (N. C.), 83 S. E. 254.

*Bristol Dist. Co. v. So. Ex. Co.*, (Court of Appeals of Virginia, decided January 12, 1915.)

In those cases the shipments which were for personal use were held not to be within the terms of the Webb-Kenyon Act, for the simple reason that there was no existing state law in the several states at that time, which would be violated by such character of shipments.

It was asserted in the brief filed by appellant on the former hearing that the Alabama court had held, in *Southern Express Co. v. State*, 66 South. Rep. 115, that no law of Alabama *could* prevent the delivery by a carrier of liquors for personal use. *This statement was a palpable error of fact.* The court did not undertake to anticipate what further legislation the state might undertake to enact in harmony with the Webb-Kenyon Act. We have seen that recently the Legislature of Alabama has enacted a further statute upon that subject, and that it has been sustained unanimously by the Supreme Court of Alabama, as applied to a shipment for personal use.

*Southern Express Co. v. Whittle*, (Ala.), 69 South. Rep. 652.

In *Palmer v. Express Co.* (Tenn.), 165 S. W. 236, there was no limitation by the statute under consideration upon the number of shipments that might be obtained by a citizen, although single shipments were forbidden in excess of one gallon; and the court held that the regulation as to the size of a shipment was simply one of interstate commerce, although the Mississippi court sustained a similar statute, in *American Express Co. v. Beer*, (Miss.), 56 South. Rep. 575. The difference between the Mississippi and Tennessee courts is of no consequence here, as the two *West Virginia statutes* of 1915 are framed on entirely different lines.

Furthermore, in *Palmer v. Express Co.*, (Tenn.), 165 S. W. 236, the validity of the Webb-Kenyon Act was assumed, but held inapplicable, because the shipment was for personal use and *there was no state law against receiving such a shipment*. What the Tennessee court would have held had the legislation been similar to that of West Virginia, or to that of Alabama and North Carolina, we cannot assert; suffice it to say, that up to this time the Tennessee court has rendered no decision that would militate against the soundness of the contentions embodied in this brief.

One other case cited for appellant will be noticed, and then we will conclude:

In *Hamm Brewing Co. v. C. R. I. & P. R. R.*, 215 Fed. 672, decided by District Judge Willard, it was said:

"But the Webb-Kenyon Law, while it says that the liquor must not be received, possessed, sold, or used in violation of law, does not say that it shall not be transported in violation of law. If it had been the intention of Congress to prohibit the procurement from points outside the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would



have been very easy to have indicated that, by prohibiting the transportation of all interstate shipments."

*In this paragraph the District Judge shows a total misconception of the meaning and purpose of the Webb-Kenyon Law. In the first place, it does not say that "the liquor must not be received, possessed, sold or used in violation of law." What it says is that all shipments of liquor are prohibited when said liquors are "intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of such state." It was not intended by Congress in its enactment to prohibit the procurement from points outside the state, by a citizen of Iowa, of liquors for his own use, nor to prohibit the procurement of such liquors by citizens of other states, for personal use; what Congress intended to do, and did, was to leave the whole matter to the states under their police power, and to give effect to whatever regulations they might adopt in reference to intoxicating liquors, whether these might relate to receipt, possession, sale or use. Had Congress prohibited transportation of all interstate shipments, as the Judge thoughtlessly suggested, this would have excluded liquors from both wet and dry states—a thing no one contemplated.*

The correct view of the meaning of the Webb-Kenyon Law was thus expressed by the Circuit Court of Appeals in the West Virginia case, 219 Fed. 794:

"This statute prohibits the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed, or in any manner used, in violation of state law. This is a direct recognition of the right of the state to prohibit the receipt or delivery, as well as

the possession and use, of liquor, without trespassing upon the power of Congress to regulate interstate commerce."

Respectfully submitted,

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CLARK DISTILLING COMPANY *v.* WESTERN  
MARYLAND RAILWAY COMPANY AND STATE  
OF WEST VIRGINIA.

CLARK DISTILLING COMPANY *v.* AMERICAN  
EXPRESS COMPANY AND STATE OF WEST  
VIRGINIA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MARYLAND.

Nos. 75, 76. Argued May 10, 11, 1915; restored to docket for reargument  
November 1, 1915; reargued November 8, 9, 1916.—Decided January 8,  
1917.

The West Virginia prohibition law of February, 1913, Code 1913,  
c. 32A, as amended by Acts of 1915, p. 33, *id.* p. 660, includes in its  
prohibitions the bringing into the State by carriers of intoxicating  
liquors intended for personal use and the receipt and possession of  
such liquors, when so introduced, for personal use.

Since the right asserted by the plaintiff is a permanent right to ship  
such liquors into the State, the decision concerns the state law as  
now amended, though the amendment occurred after the decision  
of the court below and after the first argument in this court.

Without considering whether governmental power respecting intoxi-  
cating liquors extends to the prohibition of personal use, the right  
to restrict the means of procuring them for that purpose exists as an  
incident to the indubitable power to forbid manufacture and sale.  
Therefore these prohibitions of the West Virginia law are not of-  
fensive to the due process clause of the Fourteenth Amendment.

The prohibitions, however, unless sanctioned by a valid law of Con-  
gress, would be repugnant to the Constitution as a direct burden

on interstate commerce and an interference with the power of Congress to regulate it. *Leisy v. Hardin*, 135 U. S. 100.

The Act of Congress of March 1, 1913, 37 Stat. 699, known as the Webb-Kenyon Act, operated, if constitutional, to give effect to the above stated prohibitions of the West Virginia law in respect of liquors shipped into the State for personal use, by withdrawing from such shipments the immunity of interstate commerce, and, to forbid the shipment or transportation into the State of liquors intended to be received or possessed there for personal use contrary to such state prohibitions. *Adams Express Co. v. Kentucky*, 238 U. S. 190, distinguished.

The Webb-Kenyon Act is a legitimate exertion of the power to regulate commerce.

That power, in the case of intoxicants, because of their character extends to the total prohibition of their transport in interstate commerce, and necessarily includes the lesser power, exercised in the Webb-Kenyon Act, of adapting the regulation to the various local requirements and conditions that may be expressed in the laws of the States.

Such a mode of exercise involves no delegation of the power to the States. Neither is the act objectionable as productive of a lack of uniformity.

This results:

- (1) Because it applies uniformly to the conditions which call it into play; its provisions apply to all the States, and
- (2) Because the power of Congress to regulate interstate commerce is not subject to the restriction that regulations shall be uniform throughout the United States.

The right of Congress to regulate a subject of interstate commerce, its scope and the mode in which it may be exerted, depend upon the degree of the power of Congress over the subject regulated, viz., in this case, intoxicating liquor, and not upon those considerations which cause some subjects of interstate commerce to be under state control in the absence of congressional regulation and others to be free from state control until Congress has acted. *Leisy v. Hardin*, *supra*, explained and applied.

The Webb-Kenyon Act is not repugnant to the due process clause of the Fifth Amendment.

219 Fed. Rep. 333; *id.* 339, affirmed.

THESE were suits for injunctions compelling the defendants to accept intoxicating liquors for shipment into West Virginia. The appeals were taken from decrees

of the District Court dismissing the bills. The facts are stated in the opinion.

*Mr. Lawrence Maxwell*, with whom *Mr. Joseph S. Graydon*, *Mr. Walter C. Capper* and *Mr. J. Phillip Roman* were on the briefs, for appellant:

The Webb-Kenyon Law does not in any way change the status, or permit any State to change the status, of liquors shipped in interstate commerce, except such as are intended "to be received, possessed, sold, or in any manner used," in violation of the law of the destination State. *Adams Express Co. v. Kentucky*, 238 U. S. 190. The Kentucky statute involved in that case was in all respects similar to the West Virginia statute, prior to the amendment by the West Virginia legislature on May 24, 1915. Both prohibited the interstate transportation and in terms made the place of delivery the place of sale, both in respect to intrastate and interstate shipments, and regardless of whether the shipments were intended for personal or other use. But this court, approving the construction of the Webb-Kenyon Law which had been adopted by the Court of Appeals of Kentucky in *Adams Express Co. v. Commonwealth*, 154 Kentucky, 462, held that, as the law of Kentucky permitted the personal use of liquors by the citizen and possession thereof for such use, the Webb-Kenyon Law conferred on the State of Kentucky no power to prohibit the transportation for such use, or to make the place of delivery the place of sale. The law of West Virginia also recognizes the right of the citizen of that State to have and use liquor. See *State v. Gilman*, 33 W. Va. 146, under the old constitution; and the same principle announced under the constitution of 1912 and in cases arising under the present law,—*State v. Sixo*, 87 S. E. Rep. 267; *Emsweller v. Wallace*, 88 S. E. Rep. 787; *State v. Baltimore & Ohio R. R. Co.*, 89 S. E. Rep. 288.

That being true, the decision in the Kentucky case is determinative of this case, unless it be that the amendment of May 24, 1915, to the West Virginia Law necessitates a different conclusion. That amendment makes it unlawful for a citizen of the State to receive intoxicating liquors from a common carrier, or to have in his possession liquors received from a carrier, even when intended for personal use. But where the state law permits the citizen to purchase liquors, carry them to his home, keep them there for personal use and use them, a law which punishes the receipt of liquors for personal use from a common carrier is not a police measure authorized by the Webb-Kenyon Law, but is, in so far as it applies to interstate shipments, a law regulating commerce in violation of the commerce clause of the Constitution.

Congress did not intend by the Webb-Kenyon Law to permit the States to regulate such interstate commerce, *Adams Express Co. v. Kentucky*, *supra*; nor could Congress constitutionally confer or re-delegate such power to the States, being the power to regulate interstate commerce in its fundamental aspect. *Rhodes v. Iowa*, 170 U. S. 412; *Minnesota Rate Cases*, 230 U. S. 352.

The power which the States exerted under the Wilson Law was in respect to incidents of commerce only, and did not constitute a direct burden on commerce in its fundamental aspect. See cases above cited and *cf. Delamater v. South Dakota*, 205 U. S. 93, and *Rosenberger v. Pacific Express Co.*, 240 U. S. 48.

Incidentally, it is contended that plaintiff is not entitled to the relief prayed in the bill, because plaintiff's proposed shipments into West Virginia would result from orders solicited in West Virginia, contrary to § 8 of the law, which forbids advertising and the solicitation of orders, and *State v. Davis*, 87 S. E. Rep. 262, is relied on, in connection with *Delamater v. South Dakota*, *supra*. But *State v. Davis*, holding that the solicitation of orders by interstate mail

was illegal, was based on the erroneous assumption that the resulting sales would be consummated at the place of delivery in West Virginia, in accordance with § 3 of the statute. As the State had no power to make the place of delivery the place of sale, it has no power to make the solicitation of orders by interstate mail for lawful sales in Maryland, illegal. *Delamater v. South Dakota, supra*, is not in point. That case involved a South Dakota statute imposing a tax upon the business of personally soliciting orders in the State of South Dakota. Such statute was held not a direct burden on interstate commerce, and valid under the Wilson Law. The solicitation here involved constitutes a transaction carried on in two States and one "which in its very nature requires to be governed by laws apart from the laws of the several States." The precise point was decided in *Rose v. State*, 133 Georgia, 353.

*Mr. W. B. Wheeler and Mr. Fred O. Blue* for the State of West Virginia.

By leave of court, a brief was filed by the Attorneys General of the States of Alabama, Arizona, Georgia, Idaho, Iowa, Kansas, Mississippi, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Virginia and Washington, as *amici curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

To refer to the principal state law relating to these suits, to the pleadings and the decision of the court below, will make the issues in these cases clear and point directly to the elements required to be considered in deciding them.

West Virginia in February, 1913, enacted a prohibition

law to go into effect on July 1st of the following year. Code 1913, c. 32A. Putting out of view the right of druggists under stringent regulations provided by the statute to sell for medicinal purposes and the right otherwise to sell wine for sacramental and alcohol for scientific and manufacturing purposes, the law forbade "the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale" intoxicating liquors, and the intoxicants embraced were comprehensively defined. The statute contained many restrictions concerning hotels, restaurants, clubs and so-called associations where liquor was kept and served either as a result of membership or by gift or otherwise, which were evidently intended to prevent the frustration of the prohibitions against the keeping of intoxicants for sale and purchase by subterfuge in the guise of the exercise of an individual right. There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor within the State, (b) from the clause providing that every delivery made in the State by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the State at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchases of liquor and against the publication in the State of all circulars, advertisements, price-lists, etc., which might tend to stimulate purchases of liquor.

Under this statute and in reliance upon the provisions of the act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. 699), the State of West Virginia in one of its courts sued the Western Maryland Railway Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. In sub-



stance it was charged that very many shipments had been taken by the carriers contrary to the law both as to solicitations and as to the use for which the liquor was intended. Preliminary injunctions were issued restraining the carrying of liquor into the State subject to many conditions as to investigation, etc., etc. With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor which it was asserted was ordered for personal use and deliver it in West Virginia, on the ground that the Act of Congress to Regulate Commerce imposed the duty to receive and carry and that besides the West Virginia prohibition law when rightly construed did not forbid it. The carriers, not challenging the asserted meaning of the West Virginia law, set up the injunctions and averred that to receive and carry the liquor would violate their provisions and therefore there was no duty under the United States law to do so. West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. At the trial it was shown that the plaintiff Distilling Company had systematically solicited purchases and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law. The court held that the West Virginia law did not prohibit personal use, and did not forbid shipments for such use and that as there was no state prohibition, the Webb-Kenyon Law had no application, and that as the solicitations forbidden by the state statute were solicitations to do that which was forbidden, that consideration was irrelevant. The construction of the statute made by the state court was held not authoritatively binding, as that court was not one of last resort, and the right to practically modify the injunctions was declared to exist because West Virginia by making herself a party to the suits had submitted herself to the jurisdiction of the court. All questions concerning the power of the State of West Virginia

to pass the prohibition law if it meant otherwise, and of the right of Congress to adopt the Webb-Kenyon Act under a like hypothesis, were reserved. 219 Fed. Rep. 333. Before the decrees entered became final the Circuit Court of Appeals for the Fourth Circuit in a case pending before it (*West Virginia v. Adams Express Company*, 219 Fed. Rep. 794) decided directly to the contrary. It held that the law of West Virginia did prohibit shipments for personal use; that it did forbid solicitations therefore for such purchases; that by operation of the Webb-Kenyon Act there was no longer a right to ship liquor into the State in violation of its laws; and that both the state law and the Webb-Kenyon Act were constitutional. Controlled by such decision, the trial court recalled its opinion, heard a re-argument, and, although not changing its view, accepted and gave effect to the conclusions reached by the Circuit Court of Appeals because they were deemed to be authoritative, and the cases were brought directly here, because of the constitutional questions, to review such action.

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. *The correct meaning of the West Virginia law as to the subjects in dispute.*

The difference as to the meaning of the statute in the court below was whether or not the West Virginia law prohibited the receipt of liquor for personal use; and if it did, whether or not the prohibitions of the law equally applied to shipments from outside and to those originating in the State. But the possibility of dispute over these subjects no longer exists because after the decision below and since the cases were first argued (for they have been here argued twice) the State of West Virginia amended the statute so as to leave no room for doubt that it does forbid all shipments, whether for personal use or otherwise, and whether from within or without the State. The pertinent

provisions of the amendments are placed in the margin.<sup>1</sup> As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution. Indeed, this is frankly admitted by the

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<sup>1</sup> "SEC. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however*, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word 'home' as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and, *provided, further, however*, that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes."

"SEC. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as

parties since it is unequivocally declared that the question is the operation and effect of the statute as amended and its constitutionality. We therefore come to the second question, which is:

2. *The power of the State to enact the prohibition law consistently with the due process clause of the Fourteenth Amendment and the exclusive power of Congress to regulate commerce among the several States.*

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the Fourteenth Amendment.

But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several States, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy v. Hardin*, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon

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well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however*, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

Law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?*

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act Divesting intoxicating liquors of their interstate character in certain cases.

" . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, . . . into any other State, Territory, or District of the United States, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, . . . is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the State whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State," there would seem

to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. It is insisted that this view gives too wide an effect to the Webb-Kenyon Law since that act was only intended to include state prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use, and hence as individual use was not forbidden by the state law, the shipment, receipt and possession for such use was not embraced by the Webb-Kenyon Act and the state law, so far as it was outside of that act, was repugnant to the commerce clause. This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidenced by the debates on its passage and by a decision of this court, as well as decisions of state courts (which are in the margin <sup>1</sup>) which, it is insisted, have so construed that act.

Assuming, for the sake of argument only, that the debates may be resorted to for the purpose of showing environment, we are of opinion they clearly establish a result directly contrary to that which they are cited to maintain. Undoubtedly they show that it was insisted the act was not intended to interfere with personal use, as of course it was not, since its only purpose was to give effect to state prohibitions, not to compel the States to prohibit personal use. Indeed, the meaning which it is sought to affix to the Webb-Kenyon Act, if accepted, would cause that act to have the effect of compelling the States to prohibit personal use, since if all the prohibitions of state laws against manufacture, sale, receipt and possession of intoxicants remained subject to the danger of indirect

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<sup>1</sup> *Van Winkle v. State*, 27 Del. 578; *Adams Express Co. v. Commonwealth*, 154 Ky. 462; *Adams Express Co. v. Commonwealth*, 160 Ky. 66; *Palmer v. Southern Express Co.*, 129 Tenn. 116; *Ex parte Peede*, 75 Tex. Crim. Rep. 247.

violation by permitting shipment, receipt and possession for personal use, it would follow that a necessary and immediate incentive was imposed upon the States by the Webb-Kenyon Act to enact a provision against personal use.

The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. 313) forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions (a few of the leading cases are in the margin <sup>1</sup>) which upheld that law and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced, that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensary system prevailed. *Vance v. Vandercook Company*, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it,

<sup>1</sup> *In re Rahrer*, 140 U. S. 545; *Rhodes v. Iowa*, 170 U. S. 412; *American Express Co. v. Iowa*, 196 U. S. 133; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17; *Rosenberger v. Pacific Express Co.*, 241 U. S. 48.



there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable.

The case in this court relied upon to establish the contrary (*Adams Express Company v. Kentucky*, 238 U. S. 190) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle v. State*, 27 Delaware, 578. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act pro-



hibited the shipment of intoxicants "only when the liquor is intended to be used in violation of the law of the state," and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. *Did Congress have power to enact the Webb-Kenyon Law?*

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Op. A. G. 88; Veto Message of the President, Cong. Rec., vol. 49, pt. 5, p. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several States, such action would have been lawful because within the power

to regulate which the Constitution conferred. *Lottery Case*, 188 U. S. 321; *Hoke v. United States*, 227 U. S. 308. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the States by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact the contention previously made that the prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act is in direct conflict with the proposition as to delegation now made.

So far as uniformity is concerned, there is no question

that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one State to prevent the use of interstate commerce to ship liquor from another State, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity and which, although subject to the regulation of Congress, are in the absence of such regulation subject to the control of the several States (*Cooley v. Board of Wardens*, 12 How. 299), and the other embracing subjects which do require uniformity and which in the absence of regulation by Congress remain free from all state control (*Leisy v. Hardin*, 135 U. S. 100). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the ap-

plication of state power to any degree whatever, because in the absence of the exertion by Congress of power to regulate, the subject-matter would have been free from state control, and because, besides, the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy v. Hardin*, *supra*. But that case, instead of supporting the contention, plainly refutes it for the following reason: Although *Leisy v. Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. Thus in that case in pointing out that the movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the State over the subject, it was said (p. 108): "Yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action." Again, referring to the uniform operation of interstate commerce regulations it was said (p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation, pur-

chase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the court said (p. 119): "The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, . . ." Again after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (pp. 123, 124): "But notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." And finally, after pointing out that the States had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the State, it was said that this limitation obtained "in the absence of congressional permission" to the State (p. 124).

Thus it follows that although we accept the classification of interstate commerce in intoxicants made in *Leisy v. Hardin*, we could not accept the contention which is now based upon that classification without in effect overruling that case, or what is equivalent thereto, refusing to give effect to the doctrine of that case announced in terms so certain that there is no room for controversy or contention concerning them. But we would be required to go further than this, since it would result that we would have to shut our eyes to the construction put upon the

ruling in *Leisy v. Hardin* by Congress in legislating when it adopted the Wilson Act and also to practically overrule the line of decisions which we have already referred to sustaining and enforcing that act. Let us see if this is not certain. As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a State and selling it in violation of such law was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with *In re Rahrer, supra*. As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

These considerations dispose of the contention, but we do not stop with stating them but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: The mistaken assumption that the accidental considerations which cause a subject on the one hand to come under state control in the absence of congressional regulation, and other subjects on the contrary to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to

regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce coöperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both State and Nation in their respective spheres of authority possessed the supremest authority before the action of Congress which is complained of, and hence the argument virtually comes to the assertion that in some undisclosed way by the exertion of congressional authority, power possessed has evaporated.



It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment, since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

*Affirmed.*

MR. JUSTICE McREYNOLDS concurs in the result.

MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER dissent.